S. HRG. 101-533

# MONTREAL AVIATION PROTOCOLS NOS. 3 AND 4
# EX. B, 95–1

## HEARING

BEFORE THE

## COMMITTEE ON FOREIGN RELATIONS
## UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

NOVEMBER 15, 1989

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# MONTREAL AVIATION PROTOCOLS NOS. 3 AND 4 EX. B, 95-1

WEDNESDAY, NOVEMBER 15, 1989

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, DC.*

The committee met at 9:01 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senators Pell, Kassebaum, Pressler, and McConnell.

The CHAIRMAN. The Committee on Foreign Relations will come to order.

Today, we will hold hearings on the Montreal Protocols 3 and 4 to the 1929 Convention for the Unification of Certain Rules relating to international transportation by air, the so-called Warsaw Convention.

These protocols revise the rules on airline liability for accident damages to passengers, baggage, and cargo in international air transport. They also update the regulations and passenger ticketing, baggage, and cargo documentation.

I would like to thank our witnesses for coming at this earlier than normal hour. Lech Walesa will be addressing a joint session of Congress at 11 o'clock, and I would very much like to be able to attend that, if I could, with my colleagues.

Therefore, I would urge the witnesses to be as brief as they can with their oral presentations in order that we might conclude these proceedings before the joint session, for which we have to leave at about 10:30.

I would also add at this point that Senator Biden, the ranking Democrat on the committee, cannot be with us because of the death of a close friend, and his attendance at the funeral. He is very much opposed to the Warsaw Convention, and has a statement to that effect that will be inserted in full in the record.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR BIDEN

Mr. Chairman, in 1983, the full Senate failed to ratify the Montreal Protocols, 50–42. I actively opposed the protocols then, and I find no compelling reason to modify my position now.

The United States presently is a party only to the Warsaw Convention, not to any of its subsequent revisions, or "protocols." The convention is a system of liability limits formulated in 1929 to protect the infant airline industry. It limits the liability of a carrier to $75,000 per passenger. Upon proof of "willful misconduct," however, the airline is liable for provable damages without limitation.

My strong opposition to ratification of the Montreal Protocols is based on two principles. First, I am fundamentally opposed to any system of limited liability for airlines, and thus I cannot support changes to the Warsaw Convention that preserve the existing structure. The increase in the per passenger liability limit (to approximately $130,000) proposed by the protocols merely tinkers with an outdated system. Modern airlines have adequate resources and insurance to cover their risks—they don't need or deserve liability limits.

Second, the protocols would eliminate the one category of conduct not subject to limitation under the Warsaw Convention—the "willful misconduct" exception, which allows a plaintiff who proves such conduct by the airline to recover unlimited damages. The protocols would make the per passenger liability limit of $130,000 nonbreachable. I believe this is an unconscionable intrusion by Government into the rights of all passengers and families of passengers who are victims of airline misconduct. I also believe that standards like the "willful misconduct" exception provide an important safety incentive for airlines.

SUPPLEMENTARY COMPENSATION PLAN

With regard to the supplemental compensation plan, which is the *only* thing that has changed since the Senate's deliberation on the protocols in 1983, I object to it because it is a system of *mandatory insurance.*

This *mandatory insurance* proposal, coupled with the elimination of the "willful misconduct" exception to liability limits, amounts to a tradeoff that is patently unfair to passengers: limited liability in all cases for the airlines, a new mandatory insurance program for all passengers. In other words, beyond the liability limit under the protocols, passengers would finance their own damage rewards, even in cases where the airline was deliberately negligent.

In 1983, the administration's proposed supplementary compensation plan for U.S. citizens would have provided only up to $200,000 of additional coverage per passenger, to be financed by a $2-per-passenger charge. Last year, the Reagan administration submitted a revised "draft supplemental plan" to the Senate that purports to eliminate the $200,000 cap, but in fact it does so only for recovery of "economic damages": health; rehabilitation; loss of earnings or homemaker services; and burial expenses. Noneconomic losses—recovery for pain and suffering of an injured passenger, and grief and mental anguish of survivors in the case of death—are not allowed under the plan.

I would hope that the airline associations and the administration are willing to "compromise" and allow *unlimited noneconomic damages* to be added to the plan.

PAN AMERICAN FLIGHT 103

The Pan Am 103 tragedy has been cited as an example of why the Warsaw Convention should be overhauled. I don't agree with this rationale. However, I could not disagree more with the claim made by some that ratification of the Montreal Protocols would demonstrate the Government's "sensitivity" to the situation of the families of the victims of Pan Am 103.

We will be hearing testimony today from plaintiffs who are a party to litigation associated with the Lockerbie tragedy. It is a fact that if the protocols had been in effect when that tragedy occurred, the families of the victims of Pan Am 103 would have been prohibited from attempting to prove fault on the part of the airline, and would have been entitled to recover only the amount of their "economic losses" above the $130,000 treaty liability limit.

The "economic losses" standard, which does not allow for noneconomic or punitive damages, would prevent many plaintiffs from receiving fair or just compensation. For example, in cases involving the death of college students who leave parents, as was tragically the case in the Lockerbie disaster, economic losses are generally minimal.

In sum, I remain adamantly opposed to ratification of the Montreal Protocols because I believe that each plaintiff should be allowed to sue for a recovery commensurate with the circumstances. If the "willful misconduct" exception is eliminated, examinations into fault would not be required, thereby possibly eliminating an incentive for airlines to be safety conscious. The compensation provided by the supplemental compensation plan as currently proposed, a system of mandatory insurance that I object to in principle, would be inadequate in many cases.

The CHAIRMAN. We are now prepared to hear your testimony.

Which one of you would like to lead off? I see that it is Mr. McAllister. Fine.

Mr. McAllister.

**STATEMENT OF HON. EUGENE J. McALLISTER, ASSISTANT SECRETARY FOR ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE**

Mr. MCALLISTER. Thank you, Mr. Chairman.

I would like to offer a short statement and request that my written statement be included in the record.

The CHAIRMAN. Without objection.

Mr. MCALLISTER. Thank you.

Mr. Chairman, I am pleased to appear before you today to urge the Senate to give its advice and consent to ratification of Montreal Protocols 3 and 4 to the Warsaw Convention.

These protocols will be of tremendous benefit to U.S. citizens traveling internationally by air.

I would note our commitment to ratification is inextricably tied to the creation of a satisfactory supplemental compensation plan that would finance additional liability payments of up to $500 million per aircraft per accident.

I would like to offer three points in urging ratification.

No. 1, ratification of the protocols to the Warsaw Convention will substantially improve liability protection for U.S. citizens on all international flights.

No. 2, these protocols and a supplemental compensation plan were considered by the Senate in 1983. As you will recall, they were overwhelmingly approved by this committee, but fell short of the necessary two-thirds vote in the full Senate.

Since that time, the administration has substantially improved the supplemental compensation plan to reflect the concerns expressed in 1983. In addition, recent aviation tragedies have highlighted the urgent need for greater protection for U.S. citizens in international flights.

No. 3, we acknowledge that the Warsaw Convention with these protocols is less than perfect. But with the protocols, the United States will be far better off than with the current system or without the Warsaw Convention.

Let me elaborate briefly on each of these points.

Ratification of the protocols and establishment of the supplemental compensation plan will provide more protection for U.S. citizens on international flights.

Why? Recovery is substantial. Currently, carriers serving the United States are liable for only $75,000 in damages if there is no negligence proven.

Under the protocols, carriers would be liable up to approximately $125,000 without negligence being proven.

In addition, the protocols permit the creation of a supplemental compensation plan. The Bush administration intends to create such a plan that would provide up to $500 million in economic and noneconomic damages per aircraft per accident.

Recovery is swift. The protocols and the plan create incentives that should lead to quick settlement of claims. These provisions should result in most claims being settled within 8 months of the date of the accident.

Currently, many cases drag on for 5 years or more.

Moreover, there is another important element of the protocols and the plan which provides greater protection for U.S. citizens. This concerns the question of jurisdiction.

The protocols provide that the country of the passenger's domicile or residence can serve as another basis for jurisdiction if the carrier has an establishment in the United States.

The plan provides for jurisdiction in the United States regardless of the location of the accident. In other words, a U.S. citizen on an international flight anywhere in the world will be covered. This is not true of the existing system, nor can renunciation of the Warsaw Convention guarantee jurisdiction in the United States.

Let me give you an example to illustrate my point.

American citizens were lost in the recent UTA tragedy. The plan was traveling from Chad to Paris.

Under current arrangement, recovery would be limited to the Warsaw limit of $10,000 and U.S. jurisdiction would be difficult, if not impossible, to obtain.

Under the protocols and the plan we are proposing, U.S. citizens will be covered on such flights, period. Jurisdiction in U.S. courts is assured and recovery would be up to $125,000 plus the economic and noneconomic damages under the supplemental compensation plan.

Another example is the 1974 bombing of a TWA flight over the Ionian Sea.

Lengthy litigation to break the treaty limit of $75,000, based on the conduct of the carrier, was unsuccessful.

Under the protocols and the plan we are proposing, such litigation would not be required. The only requirement for recovery would be to prove damages.

In short, this jurisdictional aspect and the plan's universal coverage is of critical significance in providing greater protection for U.S. citizens.

I also want to emphasize that the situation has changed significantly since 1983, when the Senate last considered the protocols.

The plan has been significantly improved in response to the concerns raised at that time.

In 1983, the plan provided $200,000 in economic damages. Now it provides for unlimited economic damages and noneconomic damages, subject only to the $500 million per aircraft per incident ceiling.

The third point concerns the Warsaw Convention.

We recognize that, even with these changes, the Warsaw Convention will be less than perfect. But the protocols will make it far better than the current situation and far better than having no treaty at all.

The convention is a private law treaty which provides worldwide uniformity of rules relating to international air travel. Its aim is to establish uniform rules as to rights and obligations between air carriers and users of international air transportation and, thus, eliminate the many conflicts of law questions that could arise.

Several points are worth noting.

The convention was concluded in 1929. The United States adhered to it in 1934. It has been in effect for virtually the entire history of international air transportation.

Currently, 122 countries adhere to the convention, making it the most widely adopted private law treaty in the history of mankind.

The improvements of the protocols and plan over the existing system have been noted: greater levels of recovery, faster recovery, certain recovery, and expanded jurisdiction in the United States, including certain jurisdiction in the United States under the plan.

But there are other reasons why we should continue to work within the framework provided by the convention.

The convention provides many positive operational benefits in terms of uniform rules governing international aviation. It eliminates the many conflicts of law questions which could arise. And, significantly, working within the convention framework is important to the foreign policy interests of the United States.

No. 1, the United States is in the forefront of international aviation, accounting for roughly one-quarter of all flights. Uniform rules governing international aviation are in our interest.

Our goal must be to continually improve the convention and the system that is adhered to by 121 other nations.

No. 2, the United States has spearheaded the effort to improve the convention. These protocols largely represent charges which the United States worked hard to obtain.

In addition, the United States has forged international agreements covering a broad range of aviation programs, such as safety, navigation, terrorism, and a host of other issues.

We have a vital interest in the maintenance of U.S. credibility in this area if we are to continue to play a constructive role in international aviation.

In summary, this administration is deeply concerned about the protection of American citizens on international air flights.

We believe the protocols, plus the accompanying plan, represent the best attainable system, a system that provides significantly improved protection for U.S. citizens on international flights.

We believe and hope it will be supported by the Senate.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McAllister follows:]

## PREPARED STATEMENT OF EUGENE J. McALLISTER

I appreciate this opportunity to urge the Senate to give its advice and consent to ratification of Montreal Protocols 3 & 4, which amend and modernize the provisions of the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention").

Mr. Chairman, the history of these Protocols and their importance to the development and unification of international aviation is well known to this Committee. In November 1981 and again in February 1983 this Committee recommended that the full Senate give its advice and consent to ratification of the Protocols. The Senate subsequently voted in March 1983 in favor of the Protocols by a vote of 50 in favor and 42 opposed, a clear majority but, unfortunately, less than the two-thirds required for advice and consent.

In recent months the inadequacy of the current system has become painfully clear. Under the Warsaw Convention as modified by the 1965 Montreal intercarrier agreement, victims of air disasters, such as the families of the victims of the tragic Pan Am 103 bombing, may only be entitled to $75,000 compensation for their losses. To avert this limitation, these

people must go through lengthy and uncertain litigation to prove "willful misconduct" on the part of the air carrier. Similarly, the families of the victims of the Korean Air Lines flight shot down six years ago by the Soviet Union likewise were subject to the $75,000 limit -- until they went through lengthy and painful litigation to break the Warsaw Convention limits. That litigation was just recently concluded -- and may still be subject to appeals and other delays in distribution of the award. Even more unjust is the recent UTA crash, which, once again, has the stamp of terrorism on it. The families of American citizen victims of that crash must bring suit outside of the United States and may collect only $10,000 under the Warsaw Convention (or $20,000 under the Convention as amended by the 1955 Hague Protocol).

This is no way to treat American citizens. By comparison, in domestic aviation, there are NO limits on recoveries--the average recovery for non-Warsaw death claims for accidents between 1985 and 1987 was over $800,000. Unfortunately, we cannot unilaterally dictate how other governments and legal systems should operate. These Protocols are important because they would dramatically improve and hasten recoveries available

to U.S. citizens involved in international air accidents. They also dramatically increase the likelihood that such victims and their families may bring their claims in U.S. courts. Indeed, absent a system like the Warsaw Convention, remedies for air accidents in many other countries would be uncertain and meagre by U.S. standards. It should be noted that the Protocols were only reluctantly accepted by many countries that would have preferred lower liability limits. The system we are discussing today may not be perfect, but it is a vast improvement over either the existing system or a world without a universal private air law regime. I urge the Senate to give its speedy advice and consent to ratification of these protocols.

DESCRIPTION OF THE PROTOCOLS

Before explaining the developments that have brought us before this Committee today, I will summarize very briefly certain key aspects of these Protocols.

A. Montreal Protocol 3

This Protocol amends the Warsaw Convention, as previously amended by the Guatemala City Protocol. The following provisions are included in the Guatemala City Protocol:

- o An unbreakable airline liability limit of approximately $125,000, regardless of fault, in the

case of passenger death or injury; $1,250 per passenger baggage liability limit;

- o A settlement inducement clause designed to force airlines to settle a claim within six months by subjecting them to added costs (including attorney fees) if in a subsequent trial a court awards more than the airline's offer;
- o Facilitation of suits against foreign airlines in the U.S. by permitting an action in the domicile of the passenger if the airline has an "establishment" there;
- o Recognition of the right of each participating nation to establish a supplemental compensation plan to operate within its territories.

B. Montreal Protocol 4

This Protocol amends and updates the cargo provisions of the Warsaw Convention, as amended. By ratifying Montreal Protocol No. 4, the United States would adopt the most recent rules with respect to cargo documentation and liability limits in cargo cases. The Protocol sets a limit of 17 SDRs (about $21) per kilogram in the case of cargo.

A more detailed description of the background and substance of the protocols is contained in the 1977 transmittal statement

from President Ford to the Senate and this Committee's February 10, 1983, Report. A copy of these documents is attached to this testimony for the Committee's review.

History of the Protocols

The United States has long been dissatisfied with the Warsaw Convention's outdated and unfairly low limits on carrier liability for death or injury to passengers in international air transportation. Under a United States international initiative in the early 1950s, nations agreed under the Hague Protocol to double the the Warsaw Convention limit. As described in this Committee's 1983 Report, the Hague Protocol never received Senate advice and consent to ratification.

Despite the many other advantages offered by the Warsaw Convention with respect to unification of international transportation law and practice, our dissatisfaction with the low liability limits brought our government within a few days of renouncing the Convention in 1966. The United States decided to remain in the Warsaw system only after carriers serving the United States agreed on an industry-wide basis in 1966 to waive the Convention's approximately $10,000 limitation on liability for death or injury and accept a new limit of

$75,000. Under this non-governmental agreement, known popularly as the "Montreal Agreement," air carriers serving the United States moved to a no-fault system of liability and accepted a $75,000 limit for passenger injury or death. The Montreal Agreement still applies to international transportation by air to and from the United States (or having a stopping point in the United States).

It is clear, however, and has been clear for many years, that even $75,000 as a ceiling for recovery from carriers for death or injury to passengers in international air transportation is woefully inadequate by contemporary standards. Plaintiffs routinely attempt to break this limit by invoking a provision of the Warsaw Convention that permits higher recoveries if claimants can establish that the "willful misconduct" of air carriers caused the accident. If courts determine that a carrier has engaged in such "willful misconduct", that carrier is deprived of the Convention's liability limitations. Sympathetic judges and juries may be willing to make such a finding. This uncertain system which remains in place to this day leads to expensive and lengthy litigation with inconsistent and often unfair results. For

these reasons, the United States continued its efforts since 1966 to improve the Warsaw system.

With strong U.S. encouragement, international conferences on air law were convened to draft instruments to increase existing limits on liability, allow individual nations to supplement these limits with additional domestic supplemental compensation plans, and make other much-needed improvements in the Warsaw Convention system. The 1971 Guatemala Protocol and the 1975 Montreal Protocols to the Warsaw Convention are the most up-to-date revisions of the Warsaw Convention system. Montreal Protocols 3 & 4, which combine the most important and modern aspects of the improvements in the unification of international air liability, are before you today. The successful 1971 and 1975 negotiations were an important diplomatic achievement for the United States. In almost every important respect, the international community agreed to the basic terms requested by the United States to update the Warsaw Convention.

Most significantly, under the Protocols, passengers who suffer death or injury in international air transportation will be entitled to recovery of up to 100,000 Special Drawing Rights

(approximately $125,000) on the basis of strict liability. Plaintiffs will need to show only that a passenger was in international air transportation and that the passenger suffered personal injury or death during such transportation. For virtually all passengers, the prospect of endless and unpredictable litigation over the negligence or misconduct of carriers will be over.

The United States believes strongly, however, that even this improved system of liability is insufficient under present day standards of recovery. That is why the United States insisted in international negotiations on the inclusion of a new provision that would authorize Contracting States to establish and operate "a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers." This Administration has always intended, as have previous Administrations, to exercise our rights under this provision, to augment the amended Warsaw Convention with an industry-wide supplemental compensation plan.

Thus, when the Senate earlier considered the Protocols, the Administration had provisionally approved a supplemental compensation plan. That compensation plan would have

supplemented the 100,000 SDR limit on carrier liability with an additional $200,000, plus unlimited payment for medical costs. The Administration and 50 members of the Senate believed that the Protocols with the accompanying supplemental plan would have been a considerable improvement over the present flawed system.

Much of the Senate's attention during earlier consideration of the Protocols focused on the perception some Senators felt about the possible inadequacy of this supplemental compensation plan. The Senate was lobbied heavily by opponents of the Protocols and the plan, some of whom testified before this committee in 1977 and 1981. In November 1981 and again in February 1983 this Committee recognized the benefits of the Protocols, as modified by a supplemental compensation plan, and recommended by overwhelming margins that the full Senate give its advice and consent to ratification. Nonetheless, despite the substantial improvements of the Protocols and earlier plan over existing law, concern over the size of recoveries under the plan resulted in the Protocols relatively narrow failure to obtain the necessary two-thirds majority for advice and consent to ratification.

The New Supplemental Compensation Plan

Although the Administration was disappointed at this result, we knew our work was not ended. We and predecessor Administrations had worked hard over many years to obtain the comprehensive revision of the Warsaw Convention system available to us in the Montreal Protocols and the ensuing protection such a revision could afford millions of U.S. citizens and other travelers in international air transportation, not to mention many vital improvements in other aspects of the unification of international air transportation practices and procedures. The promise of vast improvements in the Warsaw system clearly justified further effort on our part, lest we lose an important opportunity.

The U.S. Government therefore revised the supplemental compensation plan to meet the concerns that had been expressed by opponents of the plan and some members of the Senate. On June 24, 1988, Secretary of Transportation Burnley transmitted a new draft domestic plan to the Senate as part of a formal Administration request that the Senate renew active consideration of Montreal Protocols 3 & 4. Since 1988, we have further refined our thoughts about the plan. My colleagues

from the Departments of Justice and Transportation will discuss these details in greater depth.

I want to touch briefly on the ways in which the new plan meets directly those concerns that made some Senators reluctant to support the Protocols in 1983. Like its predecessor, the new plan will be a contract between air carriers and an insurer (or group of insurers) which will serve as the plan's "contractor." It provides for unlimited economic damages, payable by the contractor to victims of accidents in international air transportation, subject only to a global limit of $500 million per aircraft, per accident. The plan will also provide payments for non economic damages, such as pain and suffering and loss of consortium. When combined with the absolute liability provisions of the Protocols, the plan will guarantee adequate recovery to virtually all victims of personal injury or death in international air transportation. Moreover, the supplemental plan, like the Protocols, features important settlement inducement provisions that require the contractor to pay costs and attorneys fees to claimants if it does not make a timely and adequate settlement offer.

Ratification is in U.S. Interests

Mr. Chairman, having described the Protocols and the supplementary compensation plan, I would like to explain why ratification of these Protocols furthers important U.S. interests.

Perhaps most important, these Protocols will better protect the U.S. travelling publc. First, the strict liablility system under the amended Warsaw Convention, its settlement inducement provisions, and its allowance of national supplementary compensation plans will allow for faster, and dramatically more complete recoveries for U.S. citizens regardless of where an aviation accident occurs. Second, the Protocols would provide a new basis of jurisdiction over air carriers based on the domicile of the passenger, provided the carrier has a place of business in the territory of that country. As a result, U.S. residents and their families may bring suit in U.S. courts even though the air ticket was purchased abroad and the travel ocurred between two foreign points Currently, jurisdiction is limited to the principal place of business of the carrier, the country where the ticket was purchased, and the country of destination. These new provisions are important to many

U.S. citizens, including servicemen, missionaries, Peace Corps volunteers, diplomats, tourists, and business people, who travel between points overseas. As the world grows increasingly interdependent, and international travel becomes more commonplace, this is an even more critical aspect of the plan.

Before concluding, Mr. Chairman, I must also emphasize that, apart from the unmistakable advantages the Protocols offer to passengers in international air transportation, ratification of these two Protocols and continuing participation in the Warsaw Convention system is important to U.S. foreign and economic policy.

First, as I mentioned earlier, the Montreal Protocols resulted largely from successful U.S. initiatives in the 1960's and 1970's to overhaul the outdated Warsaw Convention system. We succeeded in persuading all other major nations engaged in international civil aviation to revise the fundamental rules that unify the system governing liability for international air transportation, yet we ourselves have not ratified these basic instruments. Many countries, in turn, are awaiting the action of the United States before ratifying these much needed

Protocols. Our inaction is a matter of continuing concern to our aviation partners and, if not remedied, could call into question our continued leadership role in this critical field.

Second, the Protocols will improve and modernize the rules for the international carriage of passengers, cargo and baggage in many other important respects. They will facilitate shipper and customer service by permitting the airlines to take advantage of state of the art automated systems. They will simplify the current cumbersome airwaybill and ticketing requirements, and will reduce the processing time for the shipping of cargo. These changes will allow U.S. shippers and carriers to use the most modern technology and become more competitive in world markets.

Third, the Warsaw Convention system provides a uniformity and certainty of practice and procedures that are vital for complex international markets. The Warsaw Convention regime provides tremendous advantages to shippers and the traveling public and is quite appropriately viewed by virtually all nations in the world as necessary to the orderly development and operation of international aviation. All major trading nations require this certainty in attempting to exploit

opportunities in other markets. The Montreal Protocols represent the most modern unification of practices and rules of liability, and the United States should seize the opportunity to become a party.

Some may ask why the United States should not simply withdraw from the Warsaw system rather than adhere to the Montreal Protocols and remain in the system. Part of the answer, of course, lies in the many advantages of the system which I have set forth above.

But there is another important reason. For forty-five years, the United states has exercized a role of preeminence in international civil aviation. This leadership began in 1944, with our hosting a world civil aviation Conference that led to the adoption of the Chicago Convention and the creation of the International Civil Aviation Organization (ICAO). Through ICAO, a specialized agency within the United Nations framework, the United States has helped create a wide range of international agreements on a wide range of matters, including important agreements in the fight against aviation terrorism. If we are to continue to play a major role in the international aviation system, we must remain within that system. This

requires cooperation with others in the system and adherence to a unified set of basic rules. While some may still argue that the Montreal Protocols standing alone are not in every respect the best set of rules, we have developed a generous supplemental compensation plan to meet the concerns raised in earlier consideration of the Protocols. We should now join with others in the system to continue moving forward toward improved international cooperation.

For all of these reasons, we believe that the United States must move rapidly toward ratification. The new supplemental compensation plan satisfies the concerns expressed in earlier consideration of the Protocols. Ratification of the Protocols will preserve the role of the United States as a world leader. We must not lose this opportunity.

Thank you very much.

The CHAIRMAN. Thank you very much, Mr. McAllister.
Mr. Shane.

**STATEMENT OF HON. JEFFREY N. SHANE, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION**

Mr. SHANE. Thank you, Mr. Chairman.
I, too, have a longer prepared statement that I would like to submit for the record, but not read it this morning.
The CHAIRMAN. Thank you. Your statement will be inserted into the record as if read. We welcome you here as Assistant Secretary for Policy and International Affairs at the Department of Transportation.
Mr. SHANE. Thank you, sir.
I also had a summary statement that I was going to read. But given the fact that it covers the same points that Mr. McAllister

has very well covered this morning, I think, because we are pressed for time this morning, I will not deliver that summary statement.

What I would like to do simply is to underscore a couple of points that Mr. McAllister has made.

The CHAIRMAN. Thank you.

Mr. SHANE. As the committee will hear later this morning, the families of the victims of the KAL–007 tragedy have been in litigation for 6 years, trying to determine whether or not it can be said that KAL was guilty of willful misconduct.

The reason they have to prove willful misconduct on the part of the carrier is in order to break the limit that is in the current Warsaw Convention, which is $75,000 per passenger.

After 6 years of litigation, having proven willful misconduct at the trial level, they still have yet to collect a dime.

It is typical of what happens in a litigation driven system.

The Warsaw Convention, amended by the Montreal protocols, and supplemented by the Supplemental Compensation Plan that we are looking at now, would provide a speed of recovery, a certainty of recovery, and an amount of recovery unsurpassed by any other system that we have been able to fashion.

The injustice in the present system to the families of victims of air tragedies in international aviation cannot be overstated. We have been trying to amend the system for a long time, to provide greater justice to these victims.

The appearance of terrorism as a major factor in international aviation now creates an entirely new challenge, because the airline, like the passenger, can be considered a victim in many of these circumstances.

To leave the recovery that passengers get in the hands of the courts, given all of the defenses and all of the jurisdictional questions that can come up in litigation, is simply to leave too much uncertainty in the system.

What we have in the Montreal Protocols and in the Supplemental Compensation Plan that we have presented to the committee is a far better system for the benefit of these passengers, and it is high time that the United States ratified this regime.

I will stop there so that we can leave the maximum amount of time for questions, Mr. Chairman.

Thank you.

[The prepared statement of Mr. Shane follows:]

## PREPARED STATEMENT OF JEFFREY N. SHANE

It is with great pleasure that I come before you today to urge that this Committee recommend that the Senate grant its advice and consent to ratification of the Montreal Protocols to the Warsaw Convention. Currently international passengers are limited to recoveries of $75,000 under the Montreal Agreement, while recoveries for deaths in recent airline crashes not subject to Warsaw have averaged over $800,000. These woefully inadequate limits of liability for passenger deaths and injuries in international air accidents, which are imposed by the Convention and the Montreal Agreement, have been applicable to U.S. international air travelers for far too long.

The tragic bombing of Pan American flight 103, in which the survivors of the deceased passengers may be subjected to the $75,000 Warsaw limit, highlights the imperative necessity of promptly correcting this long-standing injustice. In the recent UTA crash, U.S. citizens may be unable to get access to U.S. courts. We are firmly convinced that ratification of the Protocols, with the Supplemental Compensation Plan as we propose to modify it, will finally bring to international passengers the compensation to which they are entitled. And it will do so within the Warsaw system which provides a resolution to the morass of conflicts of law which would otherwise exist.

### The Historical Background

Our attempts to provide for adequate recoveries under the Warsaw Convention have had a long and tortuous history. An amendment under the 1955 Hague Protocol, which would have doubled the limits, was not ratified by the United States because of problems with a supplementary insurance program. The U.S. withdrew a notice of denunciation filed in 1965, only following a voluntary agreement among airlines serving the United States (the so called Montreal Agreement) which waived the Warsaw liability limits to

$75,000 with strict liability. That Agreement is the current basis for compensation for passengers traveling to and from the United States. However, U.S. citizens traveling between two foreign points remain subject to the original Warsaw Convention limit, which now equals approximately $10,000, or $20,000 under the Hague Protocol.

The current Protocol 3, applicable to passengers, was adopted at Guatemala in 1971, and revised in 1975 to provide a recovery of 100,000 Special Drawing Rights of the International Monetary Fund -- currently equal to about $127,000.

Because a passenger liability limit of even $127,000 was considered inadequate for standards of recovery in the United States, the U.S. insisted on another very important provision of the Protocol amendments. Article 34 of the Convention, as it would be amended by the Protocols, permits any country to adopt a national plan to supplement the carrier limits under the Convention. However, under this provision the liability of the carrier may not be increased, although the carrier may be required to collect passenger contributions to finance the plan. It is under this provision that the Supplemental Compensation Plan was developed.

In November, 1981 (by vote of 16 to 1), and again in February, 1983 (by vote of 14 to 2), this Committee recommended that the Senate grant its advice and consent to ratification of the Protocols, conditioned on the applicability of the then proposed Supplemental Compensation Plan. The Supplemental Plan then under consideration would have provided for a maximum total passenger recovery of approximately $317,000, including $117,000 carrier liability under the Convention, and $200,000 under the Supplemental Compensation Plan, financed by passenger contributions. Even this limit was considered inadequate by many

Senators, and in March, 1983, the Protocols failed to receive the necessary two thirds vote on the Senate floor. (The vote was 50 in favor, 42 against.)

**The Current Supplemental Compensation Plan**

In view of this Senate vote, the Department of Transportation, working with the Departments of State and Justice, sought to develop a Supplemental Compensation Plan that would eliminate the per passenger limit. In 1988 the Department transmitted a revised Supplemental Compensation Plan to the Senate.

Our proposed Plan is a draft. We anticipate working with this Committee and the industry to achieve the best Plan possible. We recognize that there has been opposition to certain features of our Plan, particularly the limitation to economic damages. We have reviewed this provision, and I am now able to state that the Administration is prepared to delete the limitation to economic damages. Thus, non-economic damages, but not punitive damages, would be recoverable under the Plan.

There has also been some opposition to the 20% cap on attorneys fees. On balance there is some sentiment in the Administration to retain this cap, since recoveries under the Plan will be substantially simplified, and the 20% cap is above that prevailing in accident cases, even without the benefit of the Convention's strict liability. However, we have been advised that the carriers would not wish to submit a Plan including a cap on attorneys fees. We would not reject a Plan because it lacked this feature, provided that a consumer information brochure is provided to claimants by the Plan Contractor.

With these revisions, international passengers would be placed on a full parity with domestic passengers. Their recoveries would be unlimited. Indeed, they would be in a slightly better position

since they would have the benefit of strict liability under the Protocols, a feature that could be particularly important in hijacking or sabotage cases, where proof of airline culpability could be exceedingly difficult or expensive.

The only limitation will be a $500 million global limit, per accident, per aircraft, necessary to create an insurable risk. It would be unlikely that this global limit, averaging substantially more than $1 million per passenger (although not precluding individual recoveries far in excess of the average) would ever be reached. Recoveries in the past have never approached this figure. We are, nevertheless, prepared to make this limit flexible, so that it may be adjusted in the future with increases in normal airline insurance coverage.

Recoveries from the Plan would be permitted for damages in excess of those for which the carrier is liable under the limits applicable under the Convention (currently approximately $127,000). In other words the Plan would pay that portion of the damages for which the carrier would have been liable but for the liability limit applicable under the Convention.

We believe the costs of the Plan's coverage will be reasonable, well under $5.00, and perhaps not much greater than the initial $2.00 passenger contribution applicable under the previous plan. The current plan will be underwritten by private insurance contracts, with wide solicitation for insurance underwriters or groups of underwriters, so as to obtain the lowest costs available. The contracts will be renegotiated from time to time to insure that the costs accurately reflect the private insurance market. Although th renegotiated contracts will be subject to the approval of the Department f Transportation, there will be no fund to be accumulated as provi ed in the previous Plan. This should insure the lowest available private insurance costs.

The passenger contribution will be collected on tickets sold in the United States for international transportation from the United States. The Plan will, nevertheless, cover the entire journey specified on the ticket, including domestic segments of the international trip, as well as return legs of round trip tickets.

In addition to coverage for passengers who paid the contribution (i.e., international tickets purchased in the United States), the Plan provides for full international coverage for U.S. citizens or permanent residents. Thus a U.S. citizen or permanent resident will be protected against any liability limitation applicable under the Convention, even with respect to tickets purchased abroad for international travel between two foreign points. Thus U.S. Embassy personnel stationed abroad, and citizens who take an international side trip, not covered by the original ticket, will be protected.

Participation in the Plan (collection of passenger contributions) will be mandatory for all U.S. airlines and all foreign airlines serving the United States. This will be implemented by DOT rulemaking, in the same manner as DOT rules currently require all such carriers to be parties to the 1966 Agreement establishing the current $75,000 passenger liability limit. DOT rules will also require a notice by the carriers to all potential passenger claimants of their rights of recovery under the Plan. The insurer (Contractor) under the Plan will have a "right over" against other responsible Parties, and settlement with the Plan will constitute a release of all responsible parties for economic damages.

Another important feature of the Plan is a settlement inducement provision, similar to a provision in the Protocols applicable to settlements by the carrier. Under this provision a court may require the reimbursement of the expenses of a legal action, including attorneys' fees, in the event that the Contractor has not made a settlement offer of at least two thirds of the ultimate

recovery within 60 days of an adequate proof of the claim following settlement by the carrier. This provision, coupled with the similar provision applicable to the carrier under the Protocols, should insure settlement with passengers, in the vast majority of cases within eight months following the accident. A prompt settlement is worth more than a significantly higher settlement made years later, taking into account the investment return on the payment.

**The Montreal Protocols**

Some 123 countries are currently parties to the Warsaw Convention. As noted, the Convention resolves what otherwise would be complex questions of conflicts of law in various jurisdictions, and which could give rise to extensive litigation in international airplane accidents. It also provides a worldwide level of recovery at a standard higher than would be applicable in many foreign jurisdictions -- an increase from $10,000 (or $20,000 under Hague) to $125,000.

Unfortunately, the United States cannot guaranty its citizens applicability of its laws, or access to its courts, particularly for carriers not serving the United States. The Protocols assure that a citizen or permanent resident will have jurisdiction in U.S. courts, if the carrier does business in the U.S., and the Plan assures recovery even if the flight is between two foreign points.

In addition the Protocols include important revisions to apply efficient rules for liability in the carriage of baggage and freight. The unamended Convention includes several provisions which are anachronisms created before the age of electronic data transmission, and which inhibit modern methods of transport.

**Conclusion**

Mr. Chairman, the Warsaw Convention has been in effect for almost

60 years, and is close to universal in its application. It has been a very troublesome treaty for the United States because of its very low limits of liability by U.S. standards. The United States has been a leader in efforts to amend the Convention. Other countries have, in their eyes, made major concessions to keep the United States within the Warsaw system.

The Warsaw regime is less than perfect. Nevertheless, with the Supplemental Compensation Plan we have a means to insure full recovery for U.S. citizens and permanent residents in international air transportation, while at the same time joining with the rest of the world community in establishing a more reasonable system of aviation liability. While the issues we face here are not easy, the past history of inaction has resulted in a continuing injustice to U.S. air passengers in international transportation. It is now time to bring the Convention up to date by ratification of the Protocols before you. I urge that this Committee again recommend that the Senate give its advice and consent to do so.

Thank you Mr. Chairman. That concludes my prepared Statement. I will be happy to respond to your questions.

The CHAIRMAN. Thank you very much, Mr. Shane.

We now turn to Mr. Gerson, who is the Assistant Attorney General in the Department of Justice.

## STATEMENT OF STUART M. GERSON, ESQ., ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. GERSON. Thank you, Mr. Chairman.

Like my brothers, I, too, have a longer prepared statement, which I ask be included in the record of these proceedings.

The CHAIRMAN. Without objection.

Mr. GERSON. I shall confine myself without any repetition to those particular interests and concerns in the province of the Department of Justice.

We believe strongly, as we have spoken in other areas involving the law of torts, that we need to strike an effective balance between the need to compensate those persons who are injured as the result of wrongful acts of others and compensate them in a quick, efficient, and fair way, and that those interests are to be balanced against the larger competitive needs of the American society.

We believe in, and we believe that this plan encompasses with some modifications that I shall propose, a system that would provide a welcome alternative to the present system, for the reasons that the two preceding speakers have described.

We, therefore, are happy to join in support of ratification and passage of the matters before the committee.

At the same time, we would offer several modifications which we believe would enhance the Supplemental Compensation Plan and would make it consistent with desires otherwise expressed by the Department of Justice and the administration in the area of tort reform.

We believe that the compensation plan should, within the $500 million per plane limit, include, besides unlimited economic damages, noneconomic damages as well.

In the event, however, that a claim should proceed to trial under the alternative permitted within the plan, we believe that those noneconomic damages should be excluded from the amount used to determine whether, under the penalty provisions, expenses and attorneys' fees might be recoverable.

Again, in the interest of fairness in the development of this form of compensation, we believe that after, for example, a 5-year period, the system ought to be reviewed with particular reference to the overall cap amount to see whether or not the system is working fairly.

A word on the attorneys fees is in order. In my experience with this issue, quite a few questions have been addressed to me, both pro and con, on the 20-percent cap on attorneys fees that the proposed regime affords.

My response to that is that the system currently seems to work well enough competitively that the going rate for attorneys' fees is significantly less than 20 percent.

One might, therefore, say that it ought to be left alone, that it seems to be working well enough.

At the same time, as an antitrust lawyer and in the interest of competitiveness, I have often seen that the minimum and maximum become the same, and such a cap could work in an anticompetitive way, to drive the cost up from what it is now to the 20-percent limit.

Therefore, if there is a true competitive market, which there seems to be, one could tolerate the removal of the cap on attorneys' fees.

At the same time, and in either event, we have proposed a consumer protection addition to the regime, which is described at length in my prepared comments, but, in sum, would require the contractor operating the compensation plan to provide and disseminate to potential claimants descriptive materials concerning the types of activities that are necessary to process the claim, the fact that liability will not be at issue and matters of that kind.

We believe that the inclusion of noneconomic damages would be beneficial in allaying claims outside the administrative system, that is, traditional judicial claims. That is our reasoning.

We think that such a change, however, would be consistent with our overall tort reform views because of what we believe is the fair,

though somewhat expansive, ultimate limitation of $500 million per aircraft.

With that, we make our submission, urge passage, and would defer to any questions that you might have on behalf of yourself or any of the members.

[The prepared statement of Mr. Gerson follows:]

## PREPARED STATEMENT OF STUART M. GERSON

We thank the Committee for the opportunity to present the views of the Department of Justice concerning the proposed Supplemental Compensation Plan provided as part of the Montreal Protocols.

As the Assistant Attorney General responsible for the Civil Division, my proper area of concern is limited to the issues raised by the Plan that relate to tort litigation. The Protocols address many other areas of international air travel that are more-properly addressed by others.

### Background on Warsaw Convention's Effect on International Air Accident Litigation

The Warsaw Convention of 1929 includes a limitation on liability for passenger death or personal injury in favor of the carrier providing international air transportation. The limitation was established in the Convention at 125,000 French gold francs which, at the time the United States signed the Convention in 1934, was worth approximately $8,300. Based on the last official U.S. price of gold in 1976, that worth had risen to approximately $10,000. This limitation was doubled in 1955 through the Hague Protocols, but the U.S. has never ratified those protocols.

In 1965, the United States proposed that the liability limit under the Convention be raised to $100,000, and when insufficient support for that alteration was apparent, the United States announced its intention to renounce the Convention. That option was withdrawn in May 1966, after major international air carriers serving the United States agreed to raise their liability limits through the so-called "Montreal Agreement," which provided for a liability limitation of $75,000 in compensation for each passenger.

This agreement was not a treaty requiring Senate ratification, and so it was approved by an order of the Civil Aeronautics Board. The order required signatory airlines to

observe the higher liability limits if the point of flight departure was in the United States.

The Montreal Agreement also eliminated the so-called "no negligence" defense for the carriers. It did not, however, alter the provision in the Convention that removed the limitation on liability if a claimant could prove willful misconduct on the part of the carrier.

In the mid-1970s, Montreal Protocols 3 & 4 were drafted to revise and update the Warsaw Convention in several respects. The provision in Protocol 3 which permits a nation to adopt a Supplemental Compensation Plan has generated the present proposal which, with certain modifications, will provide a procedure for swift and efficient compensation of U.S. citizens killed or injured in international air transportation.

## The Existing Proposal

As it now lies before the Committee, the proposed Supplemental Compensation Plan provides in broad terms for:

1. $500 million per accident per aircraft to pay for economic damages in claims based on personal injury or death;
2. Full compensation for economic damages for U.S. citizens on any international flight covered by the Warsaw Convention, and for non-U.S. citizens if their flight originated in the United States or the ticket was purchased here;
3. Absolute liability on the part of the air carrier, thus requiring the claimant to prove only damages;
4. Inducement for good-faith settlement offers, in that if an offer is not accepted by the claimant, he may proceed to trial on the issue of damages alone and if the prior settlement offer was not at least two-thirds of the judgment received at trial, the claimant may also recover court expenses and attorneys fees;

5. Limitation of attorneys fees to 20 percent of the recovery under the Plan;

6. The law applicable to the damage determination shall be the law of the state of residence of the passenger, the law of the state where the ticket was purchased, or a default state. To the extent that governing law conflicts with the elements of damages provided by the Plan, it would be preempted;

7. Underwriting the Plan through the commercial insurance market and financing it by a ticket surcharge.

Compensation under the Plan is additional to the basic coverage provided under the Warsaw Convention at the point when the claims exceed that coverage. Under Protocol 3, that coverage will be based on the value of 100,000 Special Drawing Rights, which is now approximately $127,000.

Philosophy Underlying Department of Justice Concerns

Some of the Department's concerns about earlier versions of the Supplemental Compensation Plan were based on our efforts to achieve reform in the overall area of tort litigation. We consistently have believed that, as a society desiring to be prosperous domestically and competitive internationally, we must strike an effective balance between the need to compensate those who are injured as a result of the wrongful acts of others and the needs of society at large. This balance must include a mechanism for providing a single and effective source for the prompt evaluation and payment of passenger claims arising from an international air disaster, with provision for a subsequent judicial proceeding when necessary to allocate fault among other responsible parties. Such a mechanism would provide a welcome alternative to the present system, which can embroil innocent passengers in expensive and time-consuming litigation in an attempt to escape the present limitations imposed by the Warsaw/Montreal Agreement.

We thus seek reforms that will ensure an efficient and relatively-inexpensive method of providing adequate compensation, while protecting against a reduction in our nation's economic activity caused by the marketplace-stifling effect of unjustifiably-expansive awards and judgments.

Department of Justice Proposal to Modify the Plan Before The Committee

At the same time as we are vitally concerned with issues of national competitiveness and tort reform, we are cognizant of both the unique circumstances surrounding international air accident litigation, and the inadequacy of the current regime. Therefore, the Department of Justice supports the Supplemental Compensation Plan before the Committee but would modify it as follows:

1. Permit the recovery of non-economic damages;
2. In the event a claim should proceed to trial, exclude any non-economic damages from the amount used to determine whether, under the penalty provisions, expenses and attorneys' fees are recoverable;
3. Require that the maximum amount damages recoverable, and the total amount of per-aircraft coverage under the Plan (currently $500 million) be reviewed at a future date (e.g., in five years) to determine the fairness of compensation and the consistency of the new system with competitiveness and tort reform interests; and
4. In view of the consumer interests of distraught victims and survivors, and the proposed elimination of any cap on attorneys' fees, require the contractor operating the Plan to produce and disseminate to potential claimants a brochure delineating the Plan's benefits and provisions, with particular reference to the procedures required to be followed for filing a claim, and giving information as to the scope of work that might be expected to be performed by an attorney.

General Comments

To provide for some degree of parity between the compensation received by the victims of domestic air accidents and that received by the victims of international air accidents, the Department of Justice believes some provision for non-economic damages is appropriate. Additionally, continued exclusion of non-economic damages would likely encourage further litigation as claimants then could, and no doubt would, seek recoveries from other potential (non airline) tortfeasors, such as the United States or airframe and engine manufacturers.

Our approach is tempered by the fact that expansive nationwide litigation awards for non-economic damages have led to a variety of results unacceptable in the general economy. However, various efforts at reform already have been undertaken by a number of states in this area, and damages under the Convention and the Plan would be subject to the state limitations. We also recognize the unique aspects of the proposed Plan which differentiate it from traditional tort litigation, in that it will be funded directly by the potential beneficiaries and is created under the terms of an intercarrier agreement which is only subject to Government approval. Furthermore, both amount of the overall coverage ($500 million) and the applicability of state damages law in most instances will provide a substantial degree of insurance against inappropriate or "runaway" awards for non-economic damages. Our provision for review of the total per-accident amount would allow for adjustment of that figure consistent with changing circumstances and the public interest.

We are aware of the efforts of some parties to have removed from the Plan the 20 percent cap on attorneys' fees on the rationale that fees currently being paid in these cases are generally less than that amount. While there are entirely-efficacious caps in some areas, for example under the Federal Tort Claims Act, the National Childhood Vaccine Compensation Act

and many state laws, and while we might seek such limitations elsewhere, we must recognize that there is considerable logic to the view that marketplace forces are controlling attorneys costs here. We also are mindful that maximum fee schedules have a tendency also to define the minimum.

All in all, our preference might have been to retain the cap based upon the "if-it-ain't-broke-don't-fix-it" rationale that it has no adverse effect on claimants' abilities to obtain counsel and serves to assure that the costs to victims of obtaining compensation do not become disproportionately high. However, we are willing to accede to a Plan without an attorneys fee limit in the expectation that the previously-demonstrated competitiveness in fees will continue to operate and, in light of the absolute liability scheme and minimal legal work necessary under the Plan, even depress fee levels further.

In this regard, we believe it very important to assist potential claimants in making informed decisions as to what, if any, counsel to retain, and what the fair value of such services might be. We believe the contractor operating the Plan should provide claimants with the information packet we earlier mentioned. This would help ensure that the market for attorneys remains competitive.

## CONCLUSION

Rapid and fair compensation for victims and survivors of international aircraft accidents is an entirely appropriate goal. The Supplemental Compensation Plan modified as the Department proposes would be a positive step in achieving that goal, without adversely affecting the wellbeing of the public at large. For these reasons, the Department of Justice supports ratification of the Protocols and adoption of a Supplemental Compensation Plan, modified as I have indicated.

I appreciate the opportunity to present the Department's views, and hope that my testimony has been useful to the Committee. I would be happy to respond to questions.

The CHAIRMAN. Thank you.

If I heard you correctly, you indicated there was a $500 million cap on payments that could come from a single crash per aircraft.

Mr. GERSON. That's right, per aircraft.

The CHAIRMAN. Right.

So, if two planes crashed, that would be $1 billion.

Mr. GERSON. Yes, sir.

The CHAIRMAN. What would be the going rate that the trial lawyers charge?

Mr. GERSON. My understanding is in some instances, where it is highly competitive, the rates are as low as 6 percent, but that they average about 11 to 15 percent in this particular tort area.

The CHAIRMAN. Thank you.

Now I would like to ask you this question. What would be the effect if the Senate does not pass or approve the protocols, if we reject the protocols?

Mr. McAllister.

Mr. MCALLISTER. Well, I think the U.S. citizen will be less well off. He will still be subjected to a $75,000 limit per accident.

It will be taken very badly, I think, in the international community, because we pushed so hard to get these protocols.

The United States has pushed the Warsaw Convention and I think, through these protocols, it has responded to our leadership.

If we fail to ratify these protocols, I think it would have a devastating effect on our leadership, and that would spill over into other areas, like what we are trying to do on terrorism.

The CHAIRMAN. Thank you.

Mr. Shane.

Mr. SHANE. In addition to all of those consequences, and maybe I am speaking personally now, but I think we would have to seriously consider denouncing the Warsaw Convention regime, because if we were stuck with a $75,000 limit, except in cases in which willful misconduct could be proven, it seems to me that the regime perpetrates a terrible injustice on victims and on the families of victims.

I don't see why we would want to stay in the regime if we couldn't amend in keeping with present needs.

The CHAIRMAN. But you would be only raising it $75,000 to $125,000.

Mr. SHANE. Well, the basic limit under the convention would be $125,000. But we would not ratify, we would not recommend ratifying the convention unless it were ratified in keeping with the Supplemental Compensation Plan that we're proposing, which raises the effective recovery to an unlimited amount of damages.

The only requirement is that economic and noneconomic damages be proven. There is no need to prove fault on the part of the carrier.

The CHAIRMAN. You say unlimited damages. I thought that it was $500 million per incident.

Mr. SHANE. That's right.

The CHAIRMAN. So, there is a limit?

Mr. SHANE. There is a theoretical limit. No accident has produced recoveries anywhere near $500 million.

That limit is simply established in order to provide an insurable risk. That is essential to the details of the Supplemental Compensa-

tion Plan. It does not represent, by any means, any effective limit on the amount that can be expected to be recovered by victims.

The CHAIRMAN. And that amount has nothing to do with the net worth of the individual. Does that formula encompass an individual's earning power. Is that the idea?

Mr. SHANE. A variety of factors—and perhaps Mr. Gerson can talk to this more accurately than I can—would have to be considered. I think earning power is certainly an important one. There are others as well.

The CHAIRMAN. But, for instance, if Donald Trump were riding in his shuttle and it crashed, would he receive a larger compensation than you or I if we were in the shuttle and it crashed?

Mr. SHANE. Let me defer to Mr. Gerson, if I may.

The CHAIRMAN. Mr. Gerson.

Mr. GERSON. That would be a matter relevant to controlling State law.

The CHAIRMAN. State law where the plane crashed or from where it took off?

Mr. GERSON. Well, one has a choice of several options under the regime provided for in the Supplemental Compensation Plan that was referred to earlier. Given that choice, the controlling State law, the controlling choice of law would apply.

It would not be a matter of net worth, but projected earnings, of course, is a usual measure of compensation in a tort accident, and perhaps in any given accident you might have the vagary implied by your question concerning a single, very wealthy individual on such a flight.

However, that is something that obtains now, as well, under traditional State law and, as was commented earlier, there has yet to be an air accident which has implicated an amount coming up to the level of this cap.

The CHAIRMAN. You say that you can choose the State. Does that mean you can choose where you took off from, where you are supposed to land, or where the crash occurred?

How does that work?

Mr. GERSON. Under the proposal, the law applicable to damage determination shall be the law of the State of residence of the passenger, the law of the State where the ticket was purchased, or a default State. To the extent that governing law conflicts with the elements of damages provided by the plan, it would be preempted.

The CHAIRMAN. Thank you.

Senator KASSEBAUM. Mr. Chairman, would you yield for a moment for a question because I am a little confused?

The CHAIRMAN. Certainly.

Senator KASSEBAUM. You are asking, for instance, about the shuttle, say from New York City to Washington.

The CHAIRMAN. Yes. I was talking about the Trump/Eastern Airlines Shuttle.

Mr. GERSON. Oh, I thought you were speaking about the individual himself.

The CHAIRMAN. I was. I had said if he were riding in his shuttle.

Mr. GERSON. On an international flight?

The CHAIRMAN. Well, no.

Senator KASSEBAUM. But it has to be an international flight.

The CHAIRMAN. Oh, thank you. It has to be international.

Mr. GERSON. That's right.

Senator KASSEBAUM. Yes, and thank you.

I was confused and I was confused by the answer a bit.

The CHAIRMAN. So, then, let's say that he was riding in a plane from here to Montreal. That would have been a better way for me to have phrased it.

Mr. GERSON. That's right.

Now, if that leaves any confusion, Senator Kassebaum, I would be happy to clarify that.

Senator KASSEBAUM. Oh, no.

I just didn't think that it applied domestically.

Mr. GERSON. You're correct.

Senator KASSEBAUM. But, interestingly enough, does it apply to an international passenger, a foreign passenger, I should say, on a domestic flight?

Mr. GERSON. On a station-to-station domestic flight?

Senator KASSEBAUM. Right.

It doesn't, does it?

Mr. GERSON. It does not.

Senator KASSEBAUM. Thank you, Mr. Chairman.

The CHAIRMAN. Certainly.

Does the Supplemental Compensation Plan set forth in the Transportation Department's letter in June have the full support of the State and Justice Departments?

I would first direct that to Mr. McAllister.

Mr. MCALLISTER. Yes, Mr. Chairman.

The CHAIRMAN. Mr. Gerson.

Mr. GERSON. It does, subject to the additions that we have proposed.

The CHAIRMAN. Are the proposed limits on recovery fair and adjustable, without having to negotiate future protocols?

What would you think, Mr. McAllister?

Mr. MCALLISTER. Yes, sir.

The CHAIRMAN. Mr. Shane.

Mr. SHANE. Absolutely, because, again, the recovery limits under the Supplemental Compensation Plan are unlimited.

It may be that in the future, we will want to adjust the protocol limits upward, so that the carrier liability is higher than $125,000, or approximately $125,000. But the effect of that on the passenger is negligible because the Supplemental Compensation Plan makes up the difference between the carrier's liability and the total amount of damages recoverable.

Mr. GERSON. Additionally, Senator, the Supplemental Compensation Plan amounts also can be adjusted.

Indeed, we have proposed a 5-year or some review period in which that might be considered.

The CHAIRMAN. Thank you very much.

Senator Kassebaum.

Senator KASSEBAUM. I have an opening statement, Mr. Chairman, that I would like made a part of the record. I won't take up the time here to deliver it.

The CHAIRMAN. It is so ordered.

[The prepared statement of Senator Kassebaum follows:]

PREPARED STATEMENT OF SENATOR KASSEBAUM

Mr. Chairman, I would like to express my strong support for the ratification of Montreal Protocols 3 and 4 to the Warsaw Convention. As you know, the Foreign Relations Committee has previously considered, and recommended, ratification of the Montreal Protocols. Unfortunately, the effort to secure full Senate ratification at that time was unsuccessful.

Now, thanks to your efforts, Mr. Chairman, for which I am grateful, we have the opportunity to consider this issue once again. We also have the opportunity to learn from past events, which, I believe, in this case calls for the prompt ratification of the protocols.

In particular, the tragedy of Pan Am flight 103 serves to underscore the urgent need to overhaul the Warsaw Convention. I believe that practically everyone, including the families of the victims of Pan Am flight 103, agrees that the current system is woefully inadequate.

Korean Airlines flight 007 is another case in point. This tragedy occurred shortly after the Senate last considered the Montreal Protocols, over 6 years ago. Incredibly, it has taken until last August, 6 years later, for the court to establish willful misconduct on the part of KAL. I now understand this decision will be appealed, while the families of the victims continue to wait for a resolution. Without a doubt, the means of recovery under the prevailing system is manifestly inadequate.

By contrast, under the Montreal Protocols, together with the proposed supplemental compensation plan, carriers are absolutely liable for damages resulting from death or injury taking place on board an aircraft. In addition, the protocols and the supplemental plan provide incentives for settlement and expand the amount of recoverable compensation.

I am mindful of the fact that the reason the Senate failed to ratify the protocols in 1983 was because of the perceived inadequacy of the then-proposed supplemental compensation plan. Among those strenuously opposed to ratification were the trial lawyers, whose representatives I understand have declined to appear today.

Mr. Chairman, I believe the currently drafted supplemental compensation plan, as proposed by Secretary Burnley in June 1988, more than adequately addresses the objections raised back in 1983. If additional changes are to be made to this plan, I would urge all parties involved to consider carefully whether such changes will truly benefit future victims of airline tragedies, or merely serve to provide additional legal fees.

It is my hope that a fair and equitable agreement will be reached to ensure what I hope will be the swift ratification by the Senate. In any case, this should not deter us from recommending ratification of the Montreal Protocols today. We—and the families of those killed in these tragedies—have waited too long to allow this opportunity to pass.

Senator KASSEBAUM. I would like to thank you for holding this hearing.

Once again, we have the opportunity to take some action in support of the Montreal protocols.

I believe it is very important for all concerned, and particularly the families who have suffered the tragedy of the Pan Am crash, as well as the KAL crash.

I just think it is interesting to note, Mr. Chairman, that when the Korean Airlines crash took place, it was just after the Montreal protocols had been considered here in the Senate before, 6 years ago.

It has taken until last August, 6 years later, for the court to establish willful misconduct on the part of KAL.

I now understand that this decision will be appealed while the families of the victims continue to wait for a resolution.

I think certainly this, without a doubt, means that the recovery under the prevailing system is manifestly inadequate.

I guess, in thinking of willful misconduct, which is under the current Warsaw regime, treaty limits do not apply unless you can prove willful misconduct.

Is that not correct—unless the airline is engaged in willful misconduct under current law?

Mr. SHANE. The treaty limits do apply, unless you can prove willful misconduct.

Senator KASSEBAUM. That's correct.

Mr. SHANE. Then you break the limit.

Senator KASSEBAUM. I'd like to ask how difficult that is to prove and how often has this occurred?

Isn't this one of the problems we face under the current law?

Mr. GERSON. Clearly, it is one of the problems that we face under current law, for the very reason that you've described regarding the KAL-007 crash. I think that is almost indisputable, that it is a problem.

I don't know how often this has come up. We have not kept a tally of it, although, quite obviously, it is difficult to show. It was intended to be difficult to show.

Senator KASSEBAUM. Well, I just wondered if, as lawyers, you had any concept of whether, indeed, willful misconduct was difficult to show.

Mr. GERSON. Willful misconduct, in practice, means wanton and reckless conduct. Obviously few, if any, people ever crash a plane on purpose.

So, the activity needs to be shown as something utterly untoward, and that is hard to do, obviously.

Senator KASSEBAUM. I think, given this Supplemental Compensation Plan, which I believe is basically similar to one put forward by Secretary Burnley in 1983—no, it would have been later than that.

Mr. SHANE. Last year Secretary Burnley resubmitted the Supplemental Compensation Plan responding to the perceived deffiiencies that resulted in rejection in 1983. That resubmitted Supplemental Compensation Plan was improved in some material ways.

Senator KASSEBAUM. Well, I would think this would be a plan that hardly could be refused. It seems to me that it has gone a long way and more than in some ways I believed was necessary to meet the complaints of all involved.

I think that the changes will truly benefit the victims of the airline tragedies and certainly I think will provide additional legal fees that should make it acceptable to the lawyers involved as well.

Thank you, Mr. Chairman.

Those are all the questions that I have.

The CHAIRMAN. Thank you very much, Senator Kassebaum.

And thank you, Messrs. Gerson, Shane, and McAllister, for being with us this morning.

I would like to keep the record open for any further questions or statements that my colleagues may wish to have inserted in the record.

We now come to the public panels, both pro and con.

I would ask if all hands could come forward—I guess I should say "all heads" come forward and be with us.

We have Mr. James Landry, Senior Vice President and General Counsel, Air Transport Association of America; Michael Styles, Regional Director, U.S. International Air Transport Association; Hans Ephraimson-Abt, Chairman of the American Association for Fami-

lies of KAL–007 Victims; Mr. Lee Kreindler of Kreindler & Kreindler, legal counsel for the plaintiffs of Pan Am 103 litigation; and former President, International Academy of Trial Lawyers, Ms. Eleanor Bright, Family of Pan Am 103 Victims, Brookline, MA.

I understand that there is yet another panelist who Senator Biden had wanted introduced. She will be introduced by Mr. Kreindler.

Mr. KREINDLER. I'm sorry, Mr. Chairman. I didn't hear your last statement.

The CHAIRMAN. It was that I understood you would introduce yet another witness.

Mr. KREINDLER. Oh, yes.

With me is Ms. Eleanor Bright.

The CHAIRMAN. Yes, I announced her.

I believe you have another colleague here?

Mr. KREINDLER. Yes. She is Mrs. Kathleen Flynn.

The CHAIRMAN. Thank you very much.

We will start out with Mr. Landry and would go in the order that I read your names.

Mr. Landry, would you lead off. And please try to bear in mind that we hope to get to the joint session with Mr. Walesa. So, we will try to move along as quickly as we can.

Mr. LANDRY. Yes, Mr. Chairman. I will be quick.

The CHAIRMAN. The less time for statements, the more time we will have for our questions, which are what really educate us.

Mr. Landry.

**STATEMENT OF JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA, WASHINGTON, DC**

Mr. LANDRY. As the initial panel indicated, over the past 60 years, the Warsaw Convention of 1929, the most widely subscribed private law treaty in the history of mankind, has achieved a signifaicant degree of uniformity among diverse legal systems and has facilitated the development of standard travel and shipping documents.

While it is important that this treaty be preserved, it is imperative that it be updated to reflect changed conditions.

The airline members of the Air Transport Association join the administration in urging the Senate to achieve this goal by giving its advice and consent to ratification of Montreal Protocols 3 and 4.

I am confining the rest of my remarks, Mr. Chairman, to Protocol 3, because that is the only controversial document.

Today, an international airline providing passenger transportation subject to the convention is presumed liable for the death or personal injury of a passenger, but may rebut that presumption by saying that it took all necessary measures to avoid the damage or that it was impossible to take such measures.

In those cases in which liability is established under the convention, recoveries are limited to $10,000, unless the carrier failed to deliver a ticket or was guilty of willful misconduct.

Proving willful misconduct, as you can imagine, is a difficult, time consuming, and expensive undertaking for a claimant.

Since 1966, carriers flying to or from the United States, as you know, have waived the defenses I have mentioned and raised the limit of recovery up to $75,000.

However, in order to recover additional damages, claimants still must prove willful misconduct on the part of the airline.

You already know the history of what U.S. negotiators achieved at Guatemala City, the precursor of the Montreal Protocols, in getting the limit raised as far as they could negotiate. As provided in Montreal, that was up to $100,000 special drawing rights, or, at the present time, about $130,000 U.S. dollars. But then, the U.S. insisted that the protocol have an additional provision that any nation could provide a Supplemental Compensation Plan for additional damages for its own citizens, for their protection.

The draft supplemental plan, submitted by former Secretary Burnley last year, was prepared in accordance with Protocol 3 and pursuant to guidelines set by the executive department of the U.S. Government.

As you know, and you, particularly, Senator Kassebaum, the Senate failed to give its advice and consent to the protocols in 1983, in large part because of the perceived inadequacy of the supplemental plan, which provided for supplemental damages of up to $200,000. That inadequacy has been addressed fully by the draft plan that the previous panel has described here this morning.

Let me just tick off what the protocol and the draft plan together will do.

It will cover all American citizens whose recovery is limited by the protocol, even though no contribution was collected, say in London, for a trip to New York or Rome.

There is one area where I think I should correct the record from the previous panel. A domestic segment of an international journey, as defined by the ticket itself, is under the convention, under the terms of the treaty.

The protocol and the draft plan together will eliminate the burden of proving willful misconduct in order to break the damage limit, a very time consuming and anguishing process.

It will permit recovery of all damages, all compensatory damages, as Mr. Gerson explained this morning, both economic and noneconomic, up to a global limit of $500 million per aircraft per incident To our knowledge, to date, the highest total recovery experienced in a single incident, for a single aircraft, is approximately $250 million.

That $500 million, I might mention, under the plan as it is being revised, will be a floor, not a ceiling, and if it needs to be adjusted in order to accommodate experience, that will be done.

The protocol and the draft plan together will also permit awards of court costs, including attorneys fees, over and above provable damages, if, in the case of the protocol, the carrier does not make an offer of settlement equal to what a court ultimately awards within 6 months following the receipt of a claim. A comparable provision is contained in the Supplemental Compensation Plan.

Last, it will open the doors of American courts to a category of American claimants who have been forced by the provisions of the convention to sue in foreign jurisdictions.

The protocol will permit suits in American courts if the claimant is domiciled or has a permanent residence in the United States and the carrier has an ordinary place of business, just a ticket office, for example, in the United States.

I submit, Madam Chairman, that the package that is before you is one that is eminently in the national and public interest, and we hope that the Senate will move swiftly to give its advice and consent to ratification of the protocols.

Thank you, Madam Chairman.

[The prepared statement of Mr. Landry follows:]

## PREPARED STATEMENT OF JAMES E. LANDRY

Good morning, Mr. Chairman. My name is James E. Landry and I am Senior Vice President and General Counsel of the Air Transport Association of America. I appreciate the opportunity to testify this morning on behalf of ATA's 23 members.

Over the past 60 years, the Warsaw Convention of 1929, the most widely subscribed private law treaty in the world, has achieved a significant degree of uniformity among diverse legal systems and has facilitated the development of standard travel and shipping documents. While it is important that this treaty be preserved, it is imperative that it be updated to reflect changed conditions. The airline members of the Air Transport Association join the Administration in urging the Senate to achieve this goal by giving its advice and consent to ratification of Montreal Protocols 3 and 4.

As there has been no controversy over the desirability of the cargo transportation amendments in Protocol 4, the balance of my testimony will focus on the clear need for the new passenger transportation regime under Protocol 3.

Today, an international airline providing passenger transportation subject to the Convention is <u>presumed</u> liable for the death or personal injury of a passenger, but may rebut that presumption by showing that it took "all necessary measures to avoid the damage or that it was impossible . . . to take such measures." In those cases in which liability is established under the Convention, recoveries are limited to $10,000 unless the carrier failed to deliver a ticket or was guilty of wilful misconduct.

Proving wilful misconduct, as you can imagine, is a difficult, time consuming and expensive undertaking for a claimant. Since 1966, carriers flying to or from the United States, or transporting passengers with a stopping point in the United States, have waived the defenses I have mentioned, and raised the limit on recovery up to $75,000. However, in order to recover additional damages, claimants still must prove wilful misconduct on the part of the airline.

For a number of years, the level of permissible recovery has been inadequate to compensate most American claimants. And for a number of years, the United States Government, under six Presidents, has spearheaded efforts to increase the limitation and to make other changes in the Convention designed to achieve certain, sufficient and speedy recovery. To that end, U.S. negotiators were able to persuade their treaty partners to agree to Montreal Protocol 3 revising the Convention by making carriers absolutely liable up to an unbreakable limit of 100,000 SDR's -- approximately $130,000 -- even if the airplane is blown up by terrorists or shot down by a hostile power in time of war. The U.S. negotiators were also successful in including a provision to induce settlements by the airline within six months of receiving a claim.

Most importantly, during the treaty negotiation process, when the United States failed to obtain agreement for a higher airline limit, U.S. negotiators insisted upon recognition in the Protocol of a nation's right to have a supplemental compensation plan operated within its territories. The United States has made it clear from the beginning that it will not ratify the Protocol without a satisfactory Supplemental Plan, and the ATA fully supports that position.

Mr. Chairman, the draft Supplemental Plan submitted by former Secretary Burnley last year was prepared in accordance with Protocol 3, and pursuant to guidelines set by the Executive Department of the U.S. Government. Those guidelines were designed to build upon the Protocol's regime of absolute liability by requiring that the Supplemental Plan provide for a virtually unlimited recovery of economic damages without the need to establish liability. As you know, the Senate failed to give its advice and consent to the Protocols in 1983, in large part because of the perceived inadequacy of the Supplemental Plan, which provided for supplemental damages of up to $200,000. That inadequacy has been addressed by the draft Plan you have before this Committee today.

In order to comply with the Protocol, the Supplemental Plan will be funded by a passenger contribution collected in the United States for international travel sold in the U.S. Together, the Protocol and the draft Plan will:

- Cover all American citizens whose recovery is limited by the Protocol even though no contribution was collected, say in London for a trip to New York or Rome.
- Eliminate the burden of proving wilful misconduct in order to break the damage limit.
- Permit recovery of all economic damages up to a global limit of $500 million per aircraft, per incident. (The highest total recovery experienced is approximately $250 million.)
- Permit awards of court costs, including attorney fees, over and above provable damages if, in the case of the Protocol, the carrier does not make an offer of settlement equal to what a court ultimately awards within six months following receipt of a claim. A comparable provision is contained in the Supplemental Plan.
- Open the doors of American courts to a category of American claimants who have been forced by the provisions of the Convention to sue in foreign jurisdictions. The Protocol will permit suits in American courts if the claimant is domiciled in the

United States and the carrier has an ordinary place of business -- for instance a ticket office -- in the United States.

The need for these changes is readily apparent. One need look no further than the tragedy of Pan American 103 for a concrete example of the value of a system providing for certain, sufficient and speedy recovery. Were the Protocol and the Plan in effect today, the odds are that most, if not all, claimants would have been compensated by now. In any event, they would not be compelled to relive their anguish in an effort to prove wilful misconduct, and they would be spared the time and expense of pursuing novel legal theories in an effort to exceed the $75,000 limit.

I submit, Mr. Chairman, that this is reason enough for the Senate to give advice and consent to ratification of the Protocol. But there are other reasons.

Although many of the negotiating partners of the U.S. are awaiting ratification by the prime mover of the Protocol, at last count, 17 nations -- over half of the number required to bring the Protocol into effect -- have despaired of U.S. leadership and have deposited instruments of ratification. As an interim measure, some of those nations, for example, the United Kingdom and Ireland, have required their own flag carriers to accept the Protocol limit pending its entry into force. At least one country -- Italy -- requires all carriers serving its territories to accept the Protocol limit. The result of these actions is that the applicable system of liability (presumed negligence or absolute liability) and the limit ($10,000, $20,000, $75,000 or $130,000) depends upon the nationality of the carrier, or the happenstance of the itinerary.

Ironically, should the Protocol come into effect without the United States as a party, and should other nations implement supplemental plans, as some have indicated they will do, American citizens may find themselves shopping for a forum abroad in order to enjoy the benefits of a system which the U.S. designed, and then abandoned. The airline industry urges this Committee and the full Senate not to let that happen. As you may know, together with IATA, we have been developing a revised draft of the Supplemental Plan to reflect the concerns and suggestions of a number of interested parties. We look forward to working with Committee members and staff to incorporate your thoughts on this important matter in the revised draft.

Mr. Chairman, as a final observation, we must recognize that terrorism is a political reality. In the five year period, 1984 through 1988, there were 12 explosions aboard air carrier aircraft killing 752 passengers and crew members. In each case, the American families of the victims were forced to cope with a woefully inadequate compensation system. Faced with a lengthy, costly legal process, the economic stability and future of these families depended solely on the success of their lawyers' strategies. And, while the legal process played out, mortgages had to be paid, children sent to college, and basic food, clothing and health care costs covered. Clearly, the time has come to update the Warsaw Convention of 1929. We urge that you recommend and the full Senate give advice and consent to ratification of these Protocols.

Senator KASSEBAUM [presiding]. Thank you very much, Mr. Landry.

I don't know the order. Who is next?

Mr. Styles.

## STATEMENT OF MICHAEL H. STYLES, REGIONAL DIRECTOR, U.S. INTERNATIONAL AIR TRANSPORT ASSOCIATION

Mr. STYLES. Yes, I think I am next.

The International Air Transport Association, is a worldwide airline trade association, incorporated by special act of the Parliament of Canada, whose members include the vast majority of the international airlines serving the United States. One of our principal objectives is to promote the orderly development of a safe and efficient international air transportation system.

No, 1, I would like to reiterate the industry's appreciation for scheduling a hearing on the request for advice and consent to ratification of the Montreal Protocols to the Warsaw Convention. The Warsaw Convention has been an important component of the system of international treaties and agreements that govern virtually all aspects of the international air transport system. Designed in 1929 to promote a uniform system of liability for international air transportation, its widespread acceptance is testimony to the importance of that goal. The realization of that objective benefits all participants in the system—governments, consumers, shippers, and airlines alike.

International airline liability is a complex subject, and there is always a wide variety of views on matters like this. A consensus is emerging, however, that something has to be done and done soon to reform this system. The existing $75,000 limitation on recoveries under the current Warsaw regime is, as Secretary of Transportation Skinner has recognized and has been reaffirmed here this morning, grossly inadequate. With the leadership of this committee, we are hopeful that the United States will soon join the growing list of countries that are parties to the protocols.

Reform of the Warsaw Convention is as timely as it is important. As recent events have so tragically demonstrated, the international air transportation system is not always immune from the dangers of the world in which we live. The modern international treaties that govern air transportation, which include the Montreal protocols, can and will continue to provide important benefits and protections to the traveling public. The protocols would expand the jurisdiction of national courts, make air carriers strictly liable for injury and death to passengers, encourage speedy settlement of claims without recourse to protracted and costly litigation, establish higher carrier limits of liability and authorize a supplemental compensation plan to keep up with higher standards of recovery in more developed countries such as the United States. These are important contributions to the international aviation system and the traveling public.

The International Air Transport Association strongly supports the administration's proposal for advice and consent to ratification of the protocols. An important element of that proposal is the draft Supplemental Compensation Plan, proposed by former Secretary of

Transportation Jim Burnley last year. We have received a large number of comments on that draft, and, together with the Air Transport Association of America, have consulted with the offices of several Senators who are interested in this issue. It is clear to us and it has been noted by the administration that the plan will require further development before the Senate completes its consideration of these important treaties. We are, in fact, preparing a revised draft compensation plan to address the concerns that have been raised, and we will work closely with this committee and its staff to produce a plan that the American traveling public will endorse and that will enable the full Senate to give its advice and consent. Our goal in this effort is, quite simply, to work within the new article 35A of the convention, which provides for the establishment of a supplemental compensation system by each contracting party.

In this regard, we will assist in the formulation of a plan in the United States that would cover full compensatory damages awardable under the convention. It is well established by U.S. courts that the convention covers both noneconomic as well as economic damages. Combined with the benefit of the convention itself, that is, expanded judicial jurisdiction, strict liability, and prompt settlement procedures, the United States will then have a progressive passenger compensation system for its citizens, one that will be supported by the international aviation community of nations and airlines.

Another important feature of the Montreal protocols is the reforms to the cargo liability system for international air transportation. Protocol No. 4 establishes a strict liability system for cargo, subject only to four specified defenses for the airline. It streamlines the cargo documentation requirements imposed by the original Warsaw Convention that include archaic barriers to modern cargo-handling procedures. Finally, it replaces gold with the more stable special drawing right as the monetary unit of liability.

In sum, these changes would provide much needed improvements to the fast growing international air cargo system by eliminating many of the uncertainties and inefficiencies that so often impede international commerce.

Madam Chairman, Montreal Protocols 3 and 4 consist of an integrated package of much needed reforms to the Warsaw system. The United States must ratify both to maintain the benefits of each of these related treaties.

That concludes my statement, Madam Chairman.

I am providing for the record and attaching to my comments a statement by IATA Director Gen. Gunter Eser, welcoming this committee's decision to proceed with its consideration of the Montreal protocols.

With your permission, I would also like to submit for the record a paper presented by our counsel to the annual meeting of the American Bar Association last summer. This paper addresses a number of the legal issues relating to these treaties.

Senator KASSEBAUM. Thank you, Mr. Styles. That will all be a part of the record.

[The prepared statement of Mr. Styles and addenda follow:]

## PREPARED STATEMENT OF MICHAEL H. STYLES

GOOD MORNING MR. CHAIRMAN. I AM MICHAEL STYLES, REGIONAL DIRECTOR, U.S., FOR THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA). IATA IS A WORLDWIDE AIRLINE TRADE ASSOCIATION INCORPORATED BY A SPECIAL ACT OF THE PARLIAMENT OF CANADA WHOSE MEMBERS INCLUDE THE VAST MAJORITY OF THE MAJOR INTERNATIONAL AIRLINES SERVING THE UNITED STATES. ONE OF OUR PRINCIPAL OBJECTIVES IS TO PROMOTE THE ORDERLY DEVELOPMENT OF A SAFE AND EFFICIENT INTERNATIONAL AIR TRANSPORTATION SYSTEM.

FIRSTLY, I WOULD LIKE TO REITERATE THE INDUSTRY'S APPRECIATION FOR SCHEDULING A HEARING ON THE REQUEST FOR ADVICE AND CONSENT TO RATIFICATION OF THE MONTREAL PROTOCOLS TO THE WARSAW CONVENTION. THE WARSAW CONVENTION HAS BEEN AN IMPORTANT COMPONENT OF THE SYSTEM OF INTERNATIONAL TREATIES AND AGREEMENTS THAT GOVERN VIRTUALLY ALL ASPECTS OF THE INTERNATIONAL AIR TRANSPORT SYSTEM. DESIGNED IN 1929 TO PROMOTE A UNIFORM SYSTEM OF LIABILITY FOR INTERNATIONAL AIR TRANSPORTATION, ITS WIDESPREAD ACCEPTANCE IS TESTIMONY TO THE IMPORTANCE OF THAT GOAL. THE REALIZATION OF THAT OBJECTIVE BENEFITS ALL PARTICIPANTS IN THE SYSTEM -- GOVERNMENTS, CONSUMERS, SHIPPERS AND AIRLINES ALIKE.

INTERNATIONAL AIRLINE LIABILITY IS A COMPLEX SUBJECT AND THERE IS ALWAYS A WIDE VARIETY OF VIEWS ON MATTERS LIKE THIS. A CONSENSUS IS EMERGING, HOWEVER, THAT SOMETHING HAS TO BE DONE AND DONE SOON TO REFORM THIS SYSTEM. THE EXISTING $75,000 LIMITATION ON RECOVERIES UNDER THE CURRENT WARSAW REGIME IS, AS SECRETARY OF TRANSPORTATION SKINNER HAS RECOGNIZED, GROSSLY INADEQUATE. WITH THE LEADERSHIP OF THIS COMMITTEE, WE ARE HOPEFUL THAT THE UNITED STATES WILL SOON JOIN THE GROWING LIST OF COUNTRIES THAT ARE PARTIES TO THE PROTOCOLS.

MR. CHAIRMAN, REFORM OF THE WARSAW CONVENTION IS AS TIMELY AS IT IS IMPORTANT. AS RECENT EVENTS HAVE SO TRAGICALLY

DEMONSTRATED, THE INTERNATIONAL AIR TRANSPORTATION SYSTEM IS NOT ALWAYS IMMUNE FROM THE DANGERS OF THE WORLD IN WHICH WE LIVE. THE MODERN INTERNATIONAL TREATIES THAT GOVERN AIR TRANSPORTATION, WHICH INCLUDE THE MONTREAL PROTOCOLS, CAN AND WILL CONTINUE TO PROVIDE IMPORTANT BENEFITS AND PROTECTIONS TO THE TRAVELING PUBLIC. THE PROTOCOLS WOULD EXPAND THE JURISDICTION OF NATIONAL COURTS, MAKE AIR CARRIERS STRICTLY LIABLE FOR INJURY AND DEATH TO PASSENGERS, ENCOURAGE SPEEDY SETTLEMENT OF CLAIMS WITHOUT RECOURSE TO PROTRACTED AND COSTLY LITIGATION, ESTABLISH HIGHER CARRIER LIMITS OF LIABILITY AND AUTHORIZE A SUPPLEMENTAL COMPENSATION PLAN TO KEEP UP WITH HIGHER STANDARDS OF RECOVERY IN MORE DEVELOPED COUNTRIES, SUCH AS THE UNITED STATES. THESE ARE IMPORTANT CONTRIBUTIONS TO THE INTERNATIONAL AVIATION SYSTEM AND THE TRAVELLING PUBLIC.

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION STRONGLY SUPPORTS THE ADMINISTRATION'S PROPOSAL FOR ADVICE AND CONSENT TO RATIFICATION OF THE PROTOCOLS. AN IMPORTANT ELEMENT OF THAT PROPOSAL IS THE DRAFT SUPPLEMENTAL COMPENSATION PLAN PROPOSED BY FORMER SECRETARY OF TRANSPORTATION JIM BURNLEY ON JUNE 24, 1988. WE HAVE RECEIVED A LARGE NUMBER OF COMMENTS ON THAT DRAFT, AND TOGETHER WITH THE AIR TRANSPORT ASSOCIATION OF AMERICA, HAVE CONSULTED WITH THE OFFICES OF SEVERAL SENATORS WHO ARE INTERESTED IN THIS ISSUE. IT IS CLEAR TO US THAT -- AS SECRETARY BURNLEY HIMSELF NOTED -- THE PLAN WILL REQUIRE FURTHER DEVELOPMENT BEFORE THE SENATE COMPLETES ITS CONSIDERATION OF THESE IMPORTANT TREATIES. WE ARE IN FACT PREPARING A REVISED DRAFT COMPENSATION PLAN TO ADDRESS THE CONCERNS THAT HAVE BEEN RAISED AND WE WILL WORK CLOSELY WITH THIS COMMITTEE AND ITS STAFF TO PRODUCE A PLAN THAT THE AMERICAN TRAVELING PUBLIC WILL ENDORSE AND THAT WILL ENABLE THE FULL SENATE TO GIVE ITS ADVICE AND CONSENT. OUR GOAL IN THIS EFFORT IS, QUITE SIMPLY, TO WORK WITHIN NEW ARTICLE 35A OF THE CONVENTION, WHICH PROVIDES FOR THE ESTABLISHMENT OF A SUPPLEMENTAL COMPENSATION SYSTEM BY EACH CONTRACTING PARTY. IN

THIS REGARD, WE WILL ASSIST IN THE FORMULATION OF A PLAN IN THE UNITED STATES THAT WOULD COVER FULL COMPENSATORY DAMAGES AWARDABLE UNDER THE CONVENTION. IT IS WELL ESTABLISHED BY U.S. COURTS THAT THE CONVENTION COVERS BOTH NON-ECONOMIC AS WELL AS ECONOMIC DAMAGES. COMBINED WITH THE BENEFITS OF THE CONVENTION ITSELF -- EXPANDED JUDICIAL JURISDICTION, STRICT LIABILITY AND PROMPT CLAIMS SETTLEMENT PROCEDURES -- THE UNITED STATES WILL THEN HAVE A PROGRESSIVE PASSENGER COMPENSATION SYSTEM FOR ITS CITIZENS, ONE THAT WILL BE SUPPORTED BY THE INTERNATIONAL AVIATION COMMUNITY OF NATIONS AND AIRLINES.

ANOTHER IMPORTANT FEATURE OF THE MONTREAL PROTOCOLS IS ITS REFORMS TO THE CARGO LIABILITY SYSTEM FOR INTERNATIONAL AIR TRANSPORTATION. PROTOCOL NO. 4 ESTABLISHES A STRICT LIABILITY SYSTEM FOR CARGO, SUBJECT ONLY TO FOUR SPECIFIED DEFENSES FOR THE AIRLINE. IT STREAMLINES THE CARGO DOCUMENTATION REQUIREMENTS IMPOSED BY THE ORIGINAL WARSAW CONVENTION THAT INCLUDE ARCHAIC BARRIERS TO MODERN CARGO HANDLING PROCEDURES. FINALLY, IT REPLACES GOLD WITH THE MORE STABLE SPECIAL DRAWING RIGHT AS THE MONETARY UNIT OF LIABILITY. IN SUM, THESE CHANGES WOULD PROVIDE MUCH NEEDED IMPROVEMENTS TO THE FAST GROWING INTERNATIONAL AIR CARGO SYSTEM BY ELIMINATING MANY OF THE UNCERTAINTIES AND INEFFICIENCIES THAT SO OFTEN IMPEDE INTERNATIONAL COMMERCE.

MR. CHAIRMAN, MONTREAL PROTOCOLS 3 AND 4 CONSIST OF AN INTEGRATED PACKAGE OF MUCH NEEDED REFORMS TO THE WARSAW SYSTEM. THE UNITED STATES MUST RATIFY BOTH TO OBTAIN THE BENEFITS OF EACH OF THESE RELATED TREATIES.

THAT CONCLUDES MY PREPARED STATEMENT, MR CHAIRMAN. I AM PROVIDING FOR THE RECORD A STATEMENT BY IATA DIRECTOR GENERAL DR. GUNTER ESER, WELCOMING THIS COMMITTEE'S DECISION TO PROCEED WITH ITS CONSIDERATION OF THE MONTREAL PROTOCOLS.

DATE: 9 November, 1989

NO.: 23

FOR IMMEDIATE RELEASE

IATA DIRECTOR GENERAL WELCOMES SENATE CONSIDERATION OF INTERNATIONAL AIR ACCORD TO INCREASE ACCIDENT COMPENSATION

Dr. Günter O. Eser, Director General of the International Air Transport Association (IATA) praised U.S. Senate Foreign Relations Committee Chairman Claiborne Pell for scheduling hearings on the ratification of the Montreal Protocols which would sharply increase compensation for victims of international aviation accidents.

In letters to the members of the Senate Foreign Relations Committee, Mr. Eser had urged the Committee to recommend ratification by the United States of the 1975 Montreal Protocols. These protocols would modernize the compensation and legal provisions of the existing 1929 Warsaw Convention governing international air travel.

Ratification of the protocols, Mr. Eser said, would, to the benefit of U.S. citizens: "expand the jurisdiction of U.S. courts in settlement disputes; make air carriers strictly liable for injury and death to passengers; encourage speedy settlement of claims; establish higher carrier limits of liability and authorize contracting parties to establish, within their territories, a system to supplement the compensation payable to claimants under the Convention in respect of death or personal injury of passengers."

The Montreal Protocols will increase current limits substantially and the United States has already determined to supplement even these new limits by a compensation plan. This plan will yield greater benefits to U.S. victims of aviation accidents or terrorist incidents. Recent criminal attacks on aviation have emphasized the need for prompt action on these treaties, said Mr. Eser.

The Committee's hearing is scheduled for November 15, 1989. IATA will work closely with the Committee, the Air Transport Association of America and the Administration in its consideration of the Protocols and the supplemental compensation plan.

**Airline Liability in International Air Transportation: The Emerging Consensus**

**Tuesday, August 8, 1989**
**American Bar Association Section of Tort and Insurance Practice**

**Warren L. Dean, Partner, Dyer, Ellis, Joseph & Mills**
**Washington, DC**

Of the many treaties to which the United States is a party, the Warsaw Convention is one of the best known to the American travelling public. The travelling public, however, generally understands very little about how the treaty works, and even less about its history. The Warsaw Convention has for the last twenty years been the figurative domain of a relatively small group of lawyers who specialize in the litigation of aviation tort claims.

Now all that may be changing. The June 24, 1988 proposal of then Secretary of Transportation Jim Burnley to reform the Warsaw Convention, the Pan Am Flight 103 disaster over Lockerbie, and the decision of the United States Supreme Court in Chan v. Korean Air Lines have set the stage for a public debate on the future of the Convention, and a growing number of people have decided to speak out in response to Secretary Burnley's call for reform. The association for the families of the KAL 007 victims, representatives of a number of Pan Am Flight 103 victims, the lawyers at a prominent aviation plaintiffs' firm and over a dozen influential United States Senators have called for action on the Administration's proposal to modernize the Warsaw Convention.

The Administration's proposal is for ratification of the Additional Protocols Nos. 3 and 4 to the Warsaw Convention, done at Montreal on September 25, 1975. The Protocols are pending in the Foreign Relations Committee of the United States Senate, and should be taken up by the Committee later this year. It is not my purpose here to review the history of the Protocols which is discussed in my recent article Airline Liability in International

Air Transportion: Time for a Change, Air and Space Lawyer, Vol. IV No. 2 Winter 1989, which I have attached. By far the most important change that will result from ratification of the Protocols is reforming what Secretary Burnley described as the "unpredictable, unfair, costly and confusing" rules for the compensation of passengers for personal injury and death, and that is the subject of this paper.

Under the current Convention, as it is administered by the United States (supplemented by CAB Agreement 18900, the so-called "Montreal Agreement"), carriers are strictly liable to passengers for personal injury and death up to an obviously inadequate limit of $75,000, which can only be broken if a passenger is able to prove willful misconduct by the carrier. While the courts have occasionally entertained other arguments to avoid the limitation, the Supreme Court in Chan v. Korean Air Lines, Ltd., 490 U.S. ___, 104 L.Ed.2D 113, decided on April 18, 1989, made it clear that it does not favor liberal approaches to the interpretation of the treaty. In Chan, the Court unanimously upheld the District Court's denial of plaintiffs' motion to deprive KAL of the benefit of the Warsaw Convention's liability limitations. Plaintiffs based their motion on the fact that the carrier's tickets provided notice of the limitation printed in 8-point type, as opposed to the minimum 10-point type required by the Montreal Agreement and DOT regulations. Several U.S. courts, including the Second Circuit in Lisi v. Alitalia-Linee Aere Italiane, which was affirmed by an equally-divided Supreme Court, had previously denied the benefits of the Convention's liability limitations where the carrier failed to provide adequate notice of the limitation in its tickets, equating such action with nondelivery of a ticket within the meaning of Article 3(2) of the Convention.

The Court's majority opinion (Scalia, Rhenquist, White,

O'Connor and Kennedy) simply disagreed with the interpretation of Article 3 underlying those cases. The Court relied upon the first sentence of Article 3(2), which states that the "irregularity . . . of the passenger ticket shall not affect the existence of the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." The majority opinion dismissed the notion that the use of 8-point type is equivalent to the failure to deliver a ticket, and compared the text of Article 3(2) to that of Articles 4(4) (baggage) and 9 (cargo), which contain explicit language denying the carrier the benefit of limited liability where the document in question fails to contain the appropriate particulars. The majority observed that where the text of the Convention is clear, recourse to its drafting history is unnecessary since the Court has no power to insert an amendment to the text. The opinion concludes by agreeing with the opinion of the Supreme Court of Canada in Ludecke v. Canadian Pacific Airlines, Ltd. that the Convention does not deprive a carrier of its limitation on liability for passenger injury and death as a sanction for a failure to provide adequate notice of that limitation.

The remaining Justices (Brennan, Marshall, Blackmun and Stevens) would not dismiss the 25 years of precedent that the majority opinion overruled. Their concurring opinion finds support in the drafting history of the Convention for the proposition that the delegates intended to apply the same regime of sanctions for failure to comply with provisions concerning passenger tickets, baggage checks and air waybills. The concurring Justices, however, were not persuaded that the 8-point type used in the tickets failed to meet some minimal standard of adequacy. The Lisi case, it was noted, involved "Lilliputian" 4-point type. These Justices flatly rejected the argument that the Montreal Agreement determined the standard of

adequate notice for these purposes. They observed that neither the Montreal Agreement nor the Federal regulations that reflect it purport to impose the sanction of loss of the Warsaw Convention's limits of liability for failure to comply with the Montreal Agreement.

The Chan decision has important implications for the future of the Warsaw Convention. Like the decision of the Court in Trans World airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984), it emphasizes that reform of this treaty must come from the political, not judicial process. Ratification of the Montreal Protocols would do just that. Accompanied by a Supplemental Compensation Plan, they would provide unlimited per passenger recovery regardless of fault under a two-tiered system of compensation. The first level consists of the carrier's liability under the Protocols, which is 100,000 SDR's (approximately $130,000). The second level consists of the liability of the Contractor under the Supplemental Compensation Plan. That Plan would accompany ratification, and be established in accordance with new Article 35A of the Convention. This system of compensation would be available to any citizen or permanent resident of the United States travelling internationally under the new treaty anywhere in the world. The new treaty would also expand the bases of court jurisdiction to authorize actions to be brought in the country of the passenger's domicile or residence, provided only that the carrier has a place of business there.

An interesting issue that has been raised by Secretary Burnley's proposed Supplemental Compensation Plan is the kinds of damages it would cover. Apparently concerned about excessive awards of non-economic damages, the draft Plan is limited in its coverage to economic damages, with the same definition of those damages that was included in the Reagan Administration's proposed

tort reform legislation. In a paper presented to a recent legal conference held in Madrid, Charles Krause of Speiser, Krause and Madole argues that the Supplemental Compensation Plan should be expanded to include full compensatory damages, and that the trade off for obtaining those damages without proof of fault is only the elimination of punitive damages. This argument has merit from a policy perspective and is certain to be considered very carefully by the Senate as it proceeds with its deliberations concerning advice and consent to ratification of the Protocols.

Furthermore, on May 5, 1989 the United States Court of Appeals for the Eleventh Circuit decided Floyd v. Eastern Airlines, Inc., No. 86-5381 (11th Cir. May 5, 1989) (1989 U.S. App. LEXIS 6302), and squarely addressed the role of non-economic damages under the Warsaw Convention. That case involved the 1983 incident in which an Eastern Airlines L-1011 lost power in all three of its engines as the result of the absence of the required oil seals or "O"-rings. The plane was able to restart one of its engines and land safely, and most of its passengers fortunately avoided physical injury. Those passengers brought actions solely for mental distress arising out of the incident. The court held that those claims for emotional injury were sufficient to state a cause of action under the Warsaw Convention and that the Convention preempts those aspects of a state law cause of action which conflict with the Convention, including the plaintiff's claim for punitive damages. Thus, a state law prohibiting the recovery of non-economic damages might well be preempted by the Convention under the rationale of this decision. Since Article 35A of the Convention requires that the Supplemental Compensation Plan "supplement the compensation payable to claimants under the Convention," the exclusion of non-economic damages from the Plan might raise serious legal uncertainties that the Senate would want to avoid.

With the inevitable resolution of these issues by the United States Senate, there can be no doubt that the compensation system to be established by ratification of the Protocols will be vastly superior to the current system, particularly where passengers become the victims of deliberate acts of violence against aviation. The $75,000 limit of recovery is grossly inadequate by modern standards. The Administration's recent offer of compensation to the families of the Iran Air victims, of up to $250,000 with respect to working individuals with dependents, is in stark contrast to the treatment of U.S. victims under the current system. Families of the victims of the Korean Air Lines tragedy, who last Wednesday obtained a jury verdict of willful misconduct, may now go to trial on the issue of damages. After 6 years they are in this respect where they could have been under the Protocols in approximately six months, and they still have to face the prospect of time consuming appeals to be filed by KAL.

Nevertheless, there are apparently some members of the legal community who remain opposed to ratification of the Protocols, and argue that the United States should instead abandon the Convention. It is a curious argument, since no President has been willing to do that. In fact, more than ever before the security and safety of U.S. international aviation depends upon the goodwill and cooperation of foreign governments, which almost unanimously support the Warsaw system. For example, the United States has recently consulted with the Government of the United Kingdom on the enhancement of security measures at Heathrow. The United Kingdom has already ratified the Montreal Protocols, and a number of its own citizens were on board Pan Am Flight 103. One cannot escape observing that the Government of the United States might well be reluctant to risk the adverse foreign relations consequences of denouncing the Convention. Thus, those who argue that we should denounce the Warsaw Convention are in effect playing Russian Roulette with the families of future victims of

international aviation disasters. The President will not denounce, the families will be left with $75,000, and the lawyers will have to attempt to establish willful misconduct, an uncertain and lengthy process at best.

Setting aside for a moment the realities of the international system, the argument that the United States should denounce the Warsaw Convention is also premised on the questionable assumption that there is an adequate legal framework that could take its place. The compensation system available for the representatives of the victims of U.S. domestic airline accidents relies upon the negligence-based tort system established by state law. By and large that system works very well in domestic air transportation. Frequently the airline, the aircraft manufacturers and the U.S. Government (as the result of its air traffic control activity) are named as parties and are subject to the court's jurisdiction. In a large number of those cases, one or more of the defendants enters into a stipulation on the question of liability and the actual trial is limited to the question of damages.

While that system works well for domestic air transportation, it has serious drawbacks in the case of international air transportation. It may not always be possible to obtain jurisdiction over all the necessary parties. Typically, U.S. courts lack jurisdiction over foreign air traffic controllers and over foreign airport and other governmental authorities which have responsibilty for safety and security. Indeed, in the absence of the Warsaw Convention, government owned foreign air carriers might be able to avoid the jurisdiction of U.S. courts in certain circumstances under the provisions of the Foreign Sovereign Immunities Act. Even if jurisdictional problems are overcome, state choice of law rules may result in the application of foreign law to determine the cause of action

or the amount of damages, with the result that U.S. citizens might be unable to obtain full compensation for their damages. It also may be impossible to recover under state tort law for damages caused by crimes committed by third parties, such as terrorists, either because the airline was not negligent or, even if it was, because the crime was an independent superseding cause that was not foreseeable. Finally, it may be impossible to prove the cause of the accident, because necessary evidence is beyond the jurisdiction of United States courts. The uncertainties of abandoning the treaty system are daunting. While lawyers might find this environment intellectually and professionally challenging, it is not very appealing from the perspective of the travelling public.

Thus, the premise of those arguing for denunciation of the Warsaw Convention is flawed from a public policy perspective. The only arguments I am aware of in support of denunciation have come from attorneys with an admitted personal stake in preserving the negligence system. While that in and of itself is not bad, at least some of the arguments appear to have gone much too far. It must be remembered that the concept of absolute liability -- not found in the original Warsaw Convention -- was advocated by the United States Government. At the insistence of our Government, it was included in the Montreal Agreement, which in 1966 raised the current limit to $75,000, and then was included in the Protocol done at Guatemala City in 1971, now incorporated in Montreal Protocol No. 3. Clearly, the rationale for absolute liability in 1971 could not have been an alleged desire on the part of airlines to avoid negligence inquiries into their safety practices ten years after enactment of the Deregulation Act of 1978.

In fact, it is precisely this deregulated environment which has made safety even more important to airlines. An airline

accident with its resultant tort exposure may or may not increase airline insurance premiums by a few million dollars a year, depending on conditions in the insurance markets and other factors. The economic consequences of the potential loss of consumer goodwill arising from even the perception of risk can cause an airline to lose much more substantial sums. Following the most recent international airline tragedy, the bombing of Pan Am Flight 103 by terrorists, Pan Am, according to its Chairman, lost over $60 million in revenues in the first quarter of 1989 alone. Faced with this huge economic exposure, the suggestion that the absolute liability system for international air transportation might somehow adversely affect carriers' safety incentives, whether economic or otherwise, is ludicrous. Since carriers will still have to have insurance and since not all risks are covered by the Convention, whatever incentives exist as the result of the carriers' tort exposure will remain. Absolute liability for the benefit of a carrier's own passengers in international air transportation is by no means a threat to the safety of air transportation. The tort system is, after all, a compensation system, which is why so many lawyers are willing to accept a stipulation of liability in domestic accidents for the sake of their clients. As Rand's Aviation Accident Study and at least one other recent study has confirmed, the tort system does not add a significant additional deterrent to the overall cost of an accident to an airline.

Finally, there are apparently some who argue that the airlines will be forcing consumers to pay the cost of the Supplemental Compensation Plan for the privilege of limiting their liability. This argument improperly equates absolute and fault-based liability and ignores the role of insurance in both compensation systems. The fact is that air carriers are required by Federal regulation to carry liability insurance, the cost of which is ultimately borne by the consumer when he or she pays the

advertised price of air transportation. The price of the coverage for the Supplemental Compensation Plan, which will also be included in the advertised price of the ticket, is designed to ensure compensation in those cases not covered by a negligence-based system and for which private insurance may not be available. The fact that the carriers' absolute liability is limited is consistent with the very nature of absolute liability systems, both in the United States and abroad, and the limit of the carriers' exposure is the product of an international consensus of governments, not airlines.

In sum, none of the arguments that have been advanced against ratification of the Protocols this year is particularly persuasive, which will become apparent by the time the Senate Foreign Relations Committee holds its upcoming hearing. Certainly, improvements can and will be made to the Supplemental Compensation Plan, and the airlines are already working with insurers, lawyers, survivors and other interested individuals to ensure that the Supplemental Compensation Plan that is put into place is both workable and consistent with the expectations of the travelling public. The United States cannot go it alone in the international community, particularly in the field of aviation. We must continue to work within the international framework that the United States has helped to fashion if we are to provide the safest, most secure, air transportation system we possibly can. That is the consensus of the airlines that support ratification of the Montreal Protocols, and that will soon become the consensus of the American public.

Next is Mr. Ephraimson-Abt.

**STATEMENT OF HANS EPHRAIMSON-ABT, CHAIRMAN, AMERICAN ASSOCIATION FOR FAMILIES OF KAL-007 VICTIMS, NEW YORK, NY**

Mr. EPHRAIMSON-ABT. Considering the limits of time which we have, I will reduce the amount of my statement, which is on file with you, and address myself only to our experiences as victims of the Korean Airlines accident of 1983.

My name is Hans Ephraimson-Abt, and I am the father of Alice Ephraimson-Abt, who perished on August 31, 1983, when KAL–007, Korean Airlines, was shot down by a Soviet fighter plane over Sakhalin Island.

There were no known survivors of that tragedy.

I am also the chairman of the American Association of KAL–007 Victims.

Since that accident, over the last 6 years I have been concerned with the aftermath of that tragedy and its consequences on an almost daily basis.

This tragedy, which occurred so many years ago, has, as yet, as you said, Madam Chairman, not been resolved under the present provisions of the Warsaw-Montreal liability system.

The victims and their families, which had no standing in the U.S. courts, were forced to settle within the outdated and insufficient limits of the existing international agreements. None of their legitimate needs were ever met.

For those who could avail themselves of the jurisdiction of our courts and make use of our existing tort system, their cases are still pending, to be finally decided.

Last July–August, 6 years after the event, a jury of well educated jurors found unanimously for willful misconduct of Korean Airlines personnel, after only a few hours of deliberation, and imposed punitive damages on the airline.

Despite that very clear verdict, the carrier chose to bring the case to the U.S. Court of Appeals in Washington, DC. Meanwhile, none of the litigating families has ever received any compensation, not even the $75,000 provided for under the Montreal Agreement of 1966.

Whenever a major airline incident occurs, there are two areas to be considered: the causes of the accident and its effects.

In our case, the Korean Airlines plane was shot down by a Soviet fighter plane over the territory of the Soviet Union at Sakhalin Island. This act of deliberate destruction of a civilian airliner, carrying hundreds of civilian passengers, including a Member of Congress, has never been fully investigated nor fully explained.

All we know is that the plane was shot down, that it disappeared without leaving any survivors or any great amount of debris.

The largest piece of the plane washed ashore measures less than 24 inches. Not one body has officially ever been recovered. Neither has any full identification ever been found.

We do not know why the plane's crew flying over one of the most closely watched areas of our world and penetrating through a high security buffer zone into Soviet airspace had not been warned in time of its deviating, dangerous flight route.

The crew flew the plane recklessly and intentionally, and as the jurors found, willfully, and they and 265 innocent, helpless, civilians fell to their doom and destruction.

Much of what is known is still mired in the maze of national security and within classified material. Records which possibly could have helped to explain this incomprehensible incident have been routinely destroyed.

Over 10,000 documents are still classified, to this day.

Because of those security considerations, our case against the U.S. Government was dismissed when our attorneys were unable to conduct proper discovery proceedings.

The absence of bodies of their loved ones has created continuous suffering, pain, and trauma for the victims' families. The disinterest of our Government agencies and of most of those who could investigate this almost unbelievable incident prevents us from finding out what really happened, if only to determine what has to be done to prevent future incidents of this kind, the severity of which could lead possibly to serious international confrontations.

In spite of all those limitations, we are thankful to all those in Congress and others who have, and who are still, helping us.

Especially, I am thankful to you, Mr. Chairman, who met with me 1 year after the accident and with my attorney. I thank you for your interest.

Thus, in our case and by extension in many other cases, the causes get mired in obfuscation. Only very determined and costly actions of families' victims organizations, of which we believe to have been the first one, can slowly push reluctant authorities to divulge what they do not want to divulge, and to admit what they do not want to admit.

Our question is for truth and not to find culprits.

Through our experience, we expect to accomplish something positive in the future as a result of our investigative efforts and, hopefully, through our existing tort system.

As to the effect of such tragedies, they are devastating for the victims and for their families. For those who escape alive, they range from permanent trauma—an incident never to be forgotten, to be relived time and time again—to permanent injury, to total disability.

In the case of death of the victims, the effects on the surviving families are equally destructive. Children, widows, orphans, loved ones, parents, they are all irreplaceable human beings, torn out suddenly and cruelly, as well as forcefully, from their loving families.

Aside from personal losses, families incur serious material problems. Mothers disappear, fathers and breadwinners perish. Children become orphans, elder people lose the support of their children.

But there is a third problem which traumatizes the victims and families.

While they are comforted by the outpouring of affection and sympathies of their friends, their neighbors, and of just- plain strangers, they are also thrown into the glaring light of unfeeling publicity. Where they need quiet and solitude, the media practically break down their doors to show their grieving.

Sensationalism and commercial concerns of others intrude on those who, in this moment of tragedy, need the privacy to mourn.

Public hearings are hurriedly conducted much before the causes of the tragedies have been sufficiently investigated and solid evidence has been developed. Public interest wanes fast.

When victims have been drained of their news value, they are thrown back into oblivion. When their experiences need attention

and when sufficient evidence into the causes of their tragedies have become known, the public forum is mostly closed to them.

As I have been told time and time again over the last years: "If you cannot state that yours was a spy plane, the story has no news value."

But not only do victims and bereaved families feel abandoned and ignored. They are constantly reminded of their bereavement by the lengthy ongoing litigation and by the serious financial concerns they are faced with because of the lack of compensation.

Most travelers are of modest means. Not many of them carry meaningful additional travel insurance. Few have sufficient financial resources to withstand major catastrophes. Children have to be educated, they have to be attended, people hold jobs, et cetera.

Let me conclude, Mr. Chairman, by saying that it is undoubtedly difficult to modernize a liability system which was conceived in much different times and circumstances 60 years ago. While ideally such a system should be rewritten entirely, it is probably even more difficult to go through the renewed process of international negotiations and ratifications.

Thus, short of denouncing the Warsaw Convention of 1929 altogether, we join in supporting the ratification of the Montreal Protocols of September 25, 1975 to the Warsaw Convention of October 12, 1929, provided that they are supplemented by a compensation plan that furnishes full recovery of both economic and noneconomic compensatory damages, including pain and suffering and any other recoveries recognized by the courts of the United States.

The proposal before you to take care of victims and victims' families needs is a welcome, although partial, solution. The protection must be improved.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ephraimson-Abt follows:]

## PREPARED STATEMENT OF HANS EPHRAIMSON-ABT

MY NAME IS HANS EPHRAIMSON-ABT. I WAS THE FATHER OF ALICE EPHRAIMSON-ABT WHO PERISHED ON AUGUST 31, 1983, WHEN FLIGHT 007, KOREAN AIRLINES, WAS SHOT DOWN BY A SOVIET FIGHTER PLANE OVER SAKHALIN ISLAND. THERE WERE NO KNOWN SURVIVORS OF THAT TRAGEDY.

I AM ALSO THE CHAIRMAN OF "THE AMERICAN ASSOCIATION OF KAL 007 VICTIMS".

AN UPDATE OF THE WARSAW CONVENTION OF OCTOBER 12, 1929 BY THE UNITED STATES IS URGENTLY NEEDED.

120 NATIONS HAVE RATIFIED THE WARSAW CONVENTION OF 1929. THIS CONVENTION WAS FIRST UPDATED BY A PROTOCOL DONE AT THE HAGUE ON SEPTEMBER 28, 1955. THE HAGUE PROTOCOL WAS RATIFIED BY 80 NATIONS. TWO FURTHER UPDATES WERE NEGOTIATED: ONE AT GUATEMALA CITY ON MARCH 8, 1971, THE OTHER AT MONTREAL ON SEPTEMBER 25, 1975. NONE OF THOSE TWO UPDATES EVER BECAME EFFECTIVE. NOT ENOUGH NATIONS RATIFIED THEM.

THE UNITED STATES, THOUGH TAKING PART IN THE NEGOTIATIONS AT THE HAGUE, AT GUATEMALA CITY AND AT MONTREAL DID NOT RATIFY ANY OF THOSE PROTOCOLS. INSTEAD, AFTER FIRST DENOUNCING THE WARSAW CONVENTION ALTOGETHER IN 1965, WE CHANGED OUR MIND IN 1966 AND UNILATERALLY INSTITUTED A SUPERVISED INTERAIRLINE AGREEMENT, KNOWN AS CAB AGREEMENT 18900, OR THE MONTREAL AGREEMENT.

I AM TESTIFYING BEFORE YOU ON THE URGENT NEED TO UPDATE AND TO MODERNIZE, AS WELL AS UNIFY, AN OUTDATED AND INADEQUATE INTERNATIONAL AIRLINE LIABILITY SYSTEM. IN ITS PRESENT FORM, ADDITIONAL PAIN AND SUFFERING IS INFLICTED ON DIRECT AND INDIRECT VICTIMS OF INTERNATIONAL AIR TRAGEDIES UNDER THE PREVAILING PROCEDURES. INSTEAD OF RELIEVING CONCERNS AND NEEDS OF THOSE

INNOCENT VICTIMS THE PRESENT SYSTEM IMPOSES FINANCIAL BURDENS, HARDSHIPS, FRUSTRATIONS AND UNBEARABLE DELAYS IN THE SETTLEMENTS OF THEIR JUST CLAIMS ON THE VICTIMS, AS WELL AS LOSSES ON THE AIRLINES.

AT THIS TIME INTERNATIONAL AIRLINE LIABILITY IS COVERED IN THE UNITED STATES BY THE 1929 WARSAW CONVENTION AND THE 1966 MONTREAL AGREEMENT. THE REST OF THE WORLD IS COVERED BY THE WARSAW CONVENTION OF 1929 UPDATED BY THE HAGUE PROTOCOL OF 1955. THOSE CONVENTIONS, PROTOCOLS AND AGREEMENTS DATE BACK 60 YEARS, 34 YEARS AND 23 YEARS, RESPECTIVELY. THE WARSAW CONVENTION OF 1929 DATES FROM A TIME WHEN OVERSEAS, WORLDWIDE AIRLINE SERVICE DID NOT EVEN EXIST. TRAVEL WAS THEN STILL MOSTLY BY SHIP, BY RAIL OR IN MANY PARTS OF THE WORLD AT THAT TIME BY HORSE OR DONKEY.

REQUIREMENTS CHANGED WHEN AIRLINE TRAVEL BECAME GLOBAL, WHEN PLANES BECAME BIGGER AND FASTER. ACCIDENTS SUDDENLY TOOK THE DIMENSIONS OF MAJOR CATASTROPHES. INSTEAD OF A FEW PASSENGERS, HUNDREDS OF HELPLESS PEOPLE BECAME VICTIMS NOT ONLY OF MECHANICAL, BUT ALSO OF HUMAN FAILURES. THEY BECAME PAWNS AND OBJECTS OF SKYJACKERS AND TERRORISTS.

THE AIRLINES LEARNED, AT BEST, THROUGH EXPERIENCE. TO THIS DAY, IMPROVEMENTS IN SECURITY, CHANGES IN PROCEDURE, AND CONCERN FOR THE SAFETY, AS WELL AS FOR THE RIGHTS OF THE FLYING PUBLIC ARE MOSTLY INSTITUTED AS A RESULT OF, AND NOT BEFORE THE OCCURRENCES OF SUCH TRAGEDIES.

ONLY THE UNITED STATES HAS A TORT SYSTEM WHICH ALLOWS US TO DEAL SOMEWHAT WITH THE AFTERMATH OF AIRLINE ACCIDENTS, AND TRAGEDIES. THROUGH THE DISCOVERY PROCEEDINGS WE ARE ABLE TO ESTABLISH RESPONSIBILITY AND FAULT. SOMETIMES WE DEVELOP INFORMATION TO DETERMINE WHERE CHANGES IN EQUIPMENT, IN PROCEDURES AND IN REGULATIONS ARE NEEDED; WHICH IMPROVEMENTS SHOULD BE MADE.

HOWEVER, OUR PRESENT RULES AND REGULATIONS GOVERNING INTERNATIONAL AIRLINE LIABILITY UNDER THE 1929 WARSAW CONVENTION WITH THE MONTREAL AGREEMENT OF 1966 SEVERELY LIMIT THE USE OF OUR EXISTING TORT SYSTEM. IT IMPOSES DIFFICULT AND ONEROUS CONDITIONS RESULTING IN COSTLY, RISKY AND LENGTHY LITIGATION. THE PRESENT LIMITS ON COMPENSATORY DAMAGES ARE INSUFFICIENT TO MEET THE DAILY NEEDS OF VICTIMS AND FAMILIES. THE SYSTEM CRUELLY PROLONGS THE AGONY, THE PAIN AND THE SUFFERING OF VICTIMS. IT IMPOSES FINANCIAL HARDSHIPS ON THEM, PRECISELY THE OPPOSITE OF WHAT A COMPREHENSIVE LIABILITY SYSTEM SHOULD ACHIEVE.

I CAME TO KNOW THE EXTENT AND THE EFFECT OF THE INADEQUACIES OF OUR PRESENT LIABILITY SYSTEM, WHEN MY DAUGHTER ALICE, AGED 23 YEARS, PERISHED ON FLIGHT 007, KOREAN AIRLINES ON AUGUST 31, 1983. SINCE THEN, OVER THE LAST SIX YEARS I HAVE BEEN CONCERNED WITH THE AFTERMATH OF THAT TRAGEDY AND ITS CONSEQUENCES ON AN ALMOST DAILY BASIS. THIS TRAGEDY, WHICH OCCURRED SO MANY YEARS AGO, HAS YET NOT BEEN RESOLVED UNDER THE PRESENT PROVISIONS OF THE WARSAW/MONTREAL LIABILITY SYSTEM. THE VICTIMS AND THEIR FAMILIES WHICH HAD NO STANDING IN UNITED STATES COURTS WERE FORCED TO SETTLE WITHIN THE OUTDATED AND INSUFFICIENT LIMITS OF THE EXISTING INTERNATIONAL AGREEMENTS. NONE OF THEIR LEGITIMATE NEEDS WERE MET.

FOR THOSE WHO COULD AVAIL THEMSELVES OF THE JURISDICTION OF OUR COURTS AND MAKE USE OF OUR EXISTING TORT SYSTEM, THEIR CASES ARE STILL PENDING TO BE FINALLY DECIDED. LAST JULY/AUGUST, SIX YEARS AFTER THE EVENT, A JURY OF WELL-EDUCATED JURORS FOUND UNANIMOUSLY FOR WILLFUL MISCONDUCT OF KOREAN AIRLINES PERSONNEL, AFTER ONLY A FEW HOURS OF DELIBERATION, AND IMPOSED PUNITIVE DAMAGES ON THE AIRLINE. DESPITE THAT VERY CLEAR VERDICT, THE CARRIER CHOSE TO BRING THE CASE TO THE UNITED STATES COURT OF APPEALS IN

WASHINGTON, D.C. MEANWHILE, NONE OF THE LITIGATING FAMILIES HAVE RECEIVED ANY COMPENSATION, NOT EVEN THE $75,000 -- PROVIDED FOR UNDER THE MONTREAL AGREEMENT OF 1966.

WHENEVER A MAJOR AIRLINE INCIDENT OCCURS THERE ARE TWO AREAS TO BE CONSIDERED. THE CAUSES OF THE ACCIDENT, AND ITS EFFECTS.

IN OUR CASE THE KOREAN AIRLINE PLANE WAS SHOT DOWN BY A SOVIET FIGHTER PLANE OVER THE TERRITORY OF THE SOVIET UNION, AT SAKHALIN ISLAND. THIS ACT OF DELIBERATE DESTRUCTION OF A CIVILIAN AIRLINE CARRYING HUNDREDS OF CIVILIAN PASSENGERS, INCLUDING A MEMBER OF CONGRESS, HAS NEVER BEEN FULLY INVESTIGATED, NOR FULLY EXPLAINED. ALL WE KNOW IS THAT THE PLANE WAS SHOT DOWN, THAT IT DISAPPEARED WITHOUT LEAVING ANY SURVIVORS, NOR ANY GREAT AMOUNT OF DEBRIS. THE LARGEST PIECE OF THE PLANE WASHED ASHORE MEASURES LESS THAN 24 INCHES. NOT ONE BODY HAS OFFICIALLY EVER BEEN RECOVERED, NEITHER HAS ANY FULL IDENTIFICATION EVER BEEN FOUND. WE DO NOT KNOW WHY THE PLANE'S CREW FLYING OVER ONE OF THE MOST CLOSELY WATCHED AREAS OF OUR WORLD AND PENETRATING THROUGH A HIGH SECURITY BUFFER ZONE INTO SOVIET AIRSPACE HAD NOT BEEN WARNED IN TIME OF HIS DEVIATING AND DANGEROUS FLIGHT ROUTE. THE CREW FLEW THE PLANE RECKLESSLY, AND INTENTIONALLY, AND AS THE JURORS FOUND: WILLFULLY, THEMSELVES AND 269 INNOCENT, HELPLESS CIVILIANS INTO DOOM AND DESTRUCTION.

MUCH OF WHAT IS KNOWN IS STILL MIRED IN THE MAZE OF NATIONAL SECURITY AND WITHIN CLASSIFIED MATERIAL. RECORDS WHICH POSSIBLY COULD HAVE HELPED TO EXPLAIN THIS INCOMPREHENSIBLE INCIDENT HAVE BEEN ROUTINELY DESTROYED. OVER 10,000 DOCUMENTS ARE STILL CLASSIFIED TO THIS DAY. BECAUSE OF THOSE SECURITY CONSIDERATIONS OUR CASE AGAINST THE UNITED STATES GOVERNMENT WAS DISMISSED, WHEN OUR ATTORNEYS WERE UNABLE TO CONDUCT PROPER DISCOVERY PROCEEDINGS.

THE ABSENCE OF BODIES OF THEIR LOVED ONES HAS CREATED CONTINUOUS SUFFERING, PAIN AND TRAUMA FOR THE VICTIMS FAMILIES. THE DISINTEREST OF OUR GOVERNMENT AGENCIES AND OF MOST OF THOSE WHO COULD INVESTIGATE THIS ALMOST UNBELIEVABLE INCIDENT, PREVENTS US FROM FINDING OUT WHAT REALLY HAPPENED, IF ONLY TO DETERMINE WHAT HAS TO BE DONE TO PREVENT FUTURE INCIDENTS OF THIS KIND, THE SEVERITY OF WHICH COULD LEAD POSSIBLY TO SERIOUS INTERNATIONAL CONFRONTATIONS. IN SPITE OF ALL THOSE LIMITATIONS WE ARE THANKFUL TO ALL THOSE, IN CONGRESS, AND OTHERWISE WHO HAVE, AND WHO ARE STILL HELPING US.

THUS, IN OUR CASE, AND BY EXTENSION IN MANY OTHER CASES, THE CAUSES GET MIRED IN OBFUSCATION. ONLY VERY DETERMINED AND COSTLY ACTIONS OF FAMILIES VICTIMS ORGANIZATIONS, OF WHICH WE BELIEVE TO HAVE BEEN THE FIRST ONE, CAN SLOWLY PUSH RELUCTANT AUTHORITIES TO DIVULGE WHAT THEY DO NOT WANT TO DIVULGE, AND TO ADMIT WHAT THEY DO NOT WANT TO ADMIT.

OUR QUEST IS FOR TRUTH, AND NOT TO FIND CULPRITS. THROUGH OUR EXPERIENCE WE EXPECT TO ACCOMPLISH SOMETHING POSITIVE IN THE FUTURE AS A RESULT OF OUR INVESTIGATIVE EFFORTS, AND HOPEFULLY THROUGH OUR EXISTING TORT SYSTEM.

AS TO THE EFFECT OF SUCH TRAGEDIES: THEY ARE DEVASTATING FOR THE VICTIMS, AND FOR THEIR FAMILIES. FOR THOSE WHO ESCAPE ALIVE, THEY RANGE FROM PERMANENT TRAUMA -- AN INCIDENT NEVER TO BE FORGOTTEN, TO BE RELIVED TIME AND TIME AGAIN -- TO PERMANENT INJURY, TO TOTAL DISABILITY. IN THE CASE OF DEATH OF THE VICTIMS, THE EFFECTS ON THE SURVIVING FAMILIES ARE EQUALLY DESTRUCTIVE. CHILDREN, WIDOWS, ORPHANS, LOVED ONES, THEY ARE IRREPLACEABLE HUMAN BEINGS, TORN OUT SUDDENLY, AND CRUELLY, AS WELL AS FORCEFULLY FROM THEIR LOVING FAMILIES.

ASIDE FROM PERSONAL LOSSES, FAMILIES INCUR SERIOUS MATERIAL PROBLEMS. MOTHERS DISAPPEAR, FATHERS AND BREADWINNERS PERISH.

CHILDREN BECOME ORPHANS, ELDER PEOPLE LOSE THE SUPPORT OF THEIR CHILDREN.

BUT THERE IS A THIRD PROBLEM WHICH TRAUMATIZES THE VICTIMS AND FAMILIES.

WHILE THEY ARE COMFORTED BY THE OUTPOURING OF AFFECTION AND SYMPATHY OF THEIR FRIENDS, OF THEIR NEIGHBORS, OF JUST PLAIN STRANGERS, THEY ARE ALSO THROWN INTO THE GLARING LIGHT OF UNFEELING PUBLICITY. WHERE THEY NEED QUIET AND SOLITUDE, THE MEDIA PRACTICALLY BREAK DOWN THEIR DOORS TO SHOW THEIR GRIEVING. SENSATIONALISM AND COMMERCIAL CONCERNS OF OTHERS INTRUDE ON THOSE WHO IN THIS MOMENT OF TRAGEDY NEED THE PRIVACY TO MOURN. PUBLIC HEARINGS ARE HURRIEDLY CONDUCTED MUCH BEFORE THE CAUSES OF TRAGEDIES HAVE BEEN SUFFICIENTLY INVESTIGATED AND SOLID EVIDENCE HAS BEEN DEVELOPED. PUBLIC INTEREST WANES FAST. WHEN VICTIMS HAVE BEEN DRAINED OF THEIR NEWS VALUE, THEY ARE THROWN BACK INTO OBLIVION. WHEN THEIR EXPERIENCES NEED ATTENTION AND WHEN SUFFICIENT EVIDENCE INTO THE CAUSES OF THEIR TRAGEDIES HAVE BECOME KNOWN, THE PUBLIC FORUM IS MOSTLY CLOSED TO THEM. AS I HAVE BEEN TOLD TIME AND TIME AGAIN OVER THE LAST YEARS: "IF YOU CANNOT STATE THAT YOURS WAS A SPY PLANE, THE STORY HAS NO NEWS VALUE".

BUT NOT ONLY DO VICTIMS AND BEREAVED FAMILIES FEEL ABANDONED AND IGNORED, THEY ARE CONSTANTLY REMINDED OF THEIR BEREAVEMENT BY THE LENGTHY ONGOING LITIGATION, AND BY THE SERIOUS FINANCIAL CONCERNS THEY ARE FACED WITH, BECAUSE OF THE LACK OF COMPENSATION.

MOST TRAVELERS ARE OF MODEST MEANS. NOT MANY OF THEM CARRY MEANINGFUL ADDITIONAL TRAVEL INSURANCE. FEW HAVE SUFFICIENT FINANCIAL RESOURCES TO WITHSTAND MAJOR CATASTROPHES. CHILDREN HAVE TO BE EDUCATED, THEY HAVE TO BE ATTENDED, EVEN WHEN A WIDOW HAS TO HOLD THREE JOBS TO MAKE HER FAMILY GO ON UNTIL THE NEVER,

NEVER DAY COMES WHEN SHE MAY COLLECT SOME COMPENSATION, IN OUR CASE QUITE POSSIBLY 10 YEARS AFTER THE EVENT.

THERE ARE TWO PROCEDURES NEEDED TO DEAL WITH INTERNATIONAL AIRLINE ACCIDENTS:

ONE A CRISIS MANUAL WHICH DETAILS ALL THE RESPONSIBILITIES AND PROCEDURES DEALING WITH MAJOR CATASTROPHES, AND AVAILABLE TO AUTHORITIES, AIRLINES, RELIEF ORGANIZATIONS, ETC.

SECOND THERE SHOULD BE A STANDBY AD HOC ORGANIZATION WHICH IS ABLE TO TAKE CARE OF MAJOR TRAGEDIES, INCLUDING ADDRESSING VICTIMS AND FAMILIES NEEDS.

WHAT IS FURTHER NEEDED IS A COMPREHENSIBLE AND FAIR LIABILITY SYSTEM WHICH ADDRESSES WITHIN REASONABLE LIMITS AND WITHIN REASONABLE TIME THE MATERIAL NEEDS OF VICTIMS. THE PROPOSAL IN THE MONTREAL PROTOCOL OF 1975 TO PROVIDE UNIFORM INITIAL ASSISTANCE IS A WELCOME, THOUGH ONLY A PARTIAL SOLUTION.

A SUPPLEMENTAL COMPENSATION PLAN SHOULD COVER BOTH ECONOMIC AND NON-ECONOMIC DAMAGES; REIMBURSEMENT OF ALL MEDICAL EXPENSES OF VICTIMS AND FAMILIES THIRTY DAYS AFTER SUBMISSION OF MEDICAL BILLS WITH A PENALTY CLAUSE FOR TARDY SETTLEMENTS; REIMBURSEMENT OF VICTIMS' AND FAMILIES' EXPENSES RESULTING FROM TRAGEDIES THEY GOT DIRECTLY AND INDIRECTLY INVOLVED IN, AND ANY RECOVERIES WHICH ARE LEGITIMATELY RECOGNIZED BY THE UNITED STATES, AND BY OTHER COURTS. THE SYSTEM SHOULD PROVIDE ADEQUATE LEVELS OF COVERAGE FOR ALL POSSIBLE RISKS.

OUR INSURANCE SYSTEM HAS WAYS TO DEAL WITH ECONOMIC LOSSES WHERE LOSS OF INCOME AND OTHER SPECIFIC VALUES CAN BE PROVEN, AND CAN BE CAPITALIZED.

HOWEVER, OUR PRESENT SYSTEM SEEMS INADEQUATE TO DEAL WITH LOSSES OF PERSONS WITHOUT PROVEN EARNINGS, SPECIFICALLY INFANTS, CHILDREN AND STUDENTS, WHICH REPRESENTS A HIGH PERCENTAGE OF INTERNATIONAL AIR ACCIDENT VICTIMS. IN THE KAL CASE WE HAD 22 CHILDREN UNDER THE AGE OF 10 YEARS ON THE PLANE. IN THE PAA 103 TRAGEDY THERE WERE NUMEROUS STUDENTS WHICH PERISHED. IN THE GANDER INCIDENT MANY OF OUR YOUNG SERVICEMEN WERE KILLED. THE SUPPLEMENTAL PLAN SHOULD ALSO PROVIDE FOR NOTIFICATION OF VICTIMS AND FAMILIES OF THEIR RIGHTS TO COMPENSATION, AS WELL AS REMINDERS OF IMPENDING EXPIRATION OF THE STATUTE OF LIMITATION, WHEN CLAIMS HAVE NOT BEEN FILED.

THE CARRIERS SHOULD ALSO MAINTAIN, AND PASS ON TO THE CONTRACTOR THE NAMES, ADDRESSES, TELEPHONE NUMBERS, AND WHERE AVAILABLE THE NAME OF NEXT OF KIN. THIS INFORMATION IS COMMONLY REQUIRED BY INSURANCE COMPANIES, INCLUDING COMPANIES WRITING TRAVEL INSURANCE.

IT IS UNDOUBTEDLY DIFFICULT TO MODERNIZE A LIABILITY SYSTEM WHICH WAS CONCEIVED IN MUCH DIFFERENT TIMES AND CIRCUMSTANCES, SIXTY YEARS AGO. WHILE, IDEALLY, SUCH A SYSTEM SHOULD BE REWRITTEN ENTIRELY, IT IS PROBABLY EVEN MORE DIFFICULT TO GO THROUGH THE RENEWED PROCESS OF INTERNATIONAL NEGOTIATIONS AND RATIFICATIONS. THUS, SHORT OF DENOUNCING THE WARSAW CONVENTION OF 1929 ALTOGETHER, WE JOIN IN SUPPORTING THE RATIFICATION OF THE MONTREAL PROTOCOL OF SEPTEMBER 25, 1975 TO THE WARSAW CONVENTION OF OCTOBER 12, 1929, PROVIDED THEY ARE SUPPLEMENTED BY A COMPENSATION PLAN THAT FURNISHES FULL RECOVERY OF BOTH ECONOMIC AND NON-ECONOMIC COMPENSATORY DAMAGES, INCLUDING PAIN AND SUFFERING AND ANY OTHER RECOVERIES RECOGNIZED BY THE COURTS OF THE UNITED STATES. THE PROPOSAL BEFORE YOU TO TAKE CARE OF VICTIMS AND VICTIMS' FAMILIES NEEDS IS A WELCOME, ALTHOUGH PARTIAL SOLUTION. THE PROTECTION MUST BE IMPROVED.

IN CONCLUSION, WE HAVE TO DO AWAY WITH AN INADEQUATE SYSTEM THAT IMPOSES CONTINUOUS CRUEL HARDSHIP RESULTING FROM AIR ACCIDENTS. WE HAVE TO REPLACE IT WITH A LIABILITY SYSTEM WHICH ADDRESSES THE LEGITIMATE, IMMEDIATE AND LONG-RANGE NEEDS OF VICTIMS AND THEIR FAMILIES TO ALLOW THEM, AS BEST AS WE POSSIBLY CAN, TO CONTINUE THEIR LIVES WITH DIGNITY AND REASONABLE FINANCIAL SECURITY.

THANK YOU.

The CHAIRMAN. Thank you, and now we will turn to Mr. Kreindler, and I will ask Mr. Kreindler, is he any relation to that wonderful restaurant family?

Mr. KREINDLER. Yes, indeed, Senator Pell. They are the Kreindlers and we are the Kreindlers. The relationship, I should say, is one of blood and not money. [Laughter.]

But they do, or did, run a fine establishment. Pete is still there, as I hope you know.

The CHAIRMAN. I certainly do.

Mr. KREINDLER. It is a super place, so there is quality at least in part of the family.

The CHAIRMAN. Very well. Please proceed.

## STATEMENT OF LEE S. KREINDLER, KREINDLER & KREINDLER, NEW YORK CITY

Mr. KREINDLER. Let me say, Senator Pell and Senator Kassebaum, that it is a great pleasure and a great honor for me to be back here.

Senator Pell, I guess I have met you three times and every time I have been sitting at this table, so this is an old song that I sing. In fact, I think I testified five times over the last 35 years before this committee on the Warsaw Convention or the various protocols or suggestions that have been made to it and I very much appreciate your concern and the courtesy that you have afforded me.

The CHAIRMAN. I think I have been a member of this committee for most of those years, too.

Mr. KREINDLER. Yes, that is right. Well, let me get right to the point. First, let me say that I have a written statement which I would like to hand up. I have not physically given it to the committee yet.

The CHAIRMAN. Then it will be inserted into the record as if read. I would hope that your read statements can be as brief as possible, because then we can get into our questions.

Mr. KREINDLER. All right. I also have a statement from Mrs. Bright, who is sitting at my right, and Mrs. Flynn, who is sitting at my right, and to save time let me hand those up as well.

Let me get right to the point, if I may. The fundamental issue that I think the Senate must confront is whether in total respect it is prepared to abandon in every way the fault system when it comes to aviation.

It has been my privilege and honor to serve as lead counsel in a number of cases, but one in particular is quite relevant, and that is the litigation arising out of the Pan Am 103 disaster over Lockerbie.

Eleanor Bright, who is at my right, lost her husband. Eleanor is on the board of one of the two family associations, for Victims of Pan Am 103, Lockerbie. Kathleen Flynn, also at my right, lost her son. She is on the board of the other family association, Families of Pan Am 103, Lockerbie. For me, virtually every working hour since December 21 of last year has been devoted to this disaster.

I urge upon you consideration of the following: the litigation into Lockerbie has revealed the most extraordinary, the most scandalous events concerning the lack of security in our system. I choose this occasion to tell you some of what you do not know today about Lockerbie, and what you would never have known had you in 1983 ratified the Montreal protocols.

This information, this kind of thing, must get to the surface if the Senate, if the House, if our Government is going to deal with it.

The litigation process is the only source of information like this. It cannot come, by its very nature, from the FAA. It does not come in international accidents from the NTSB.

The FBI has not revealed it. The Scottish investigation is going into the criminal activities. But let me just give you a bird's eye view of some of what the world will know and be able to deal with because of the pending litigation in a Warsaw convention case.

I say at the outset that I am of course opposed to the abominable Warsaw Convention. I would say to Mr. Ephraimson-Abt that we should denounce the convention and I was glad to hear Mr. Shane say that if the protocols are not ratified we should denounce the Warsaw Convention, as indeed we did in 1965. Denunciation, then, was withdrawn as you know, when the airlines agreed to the interim Montreal agreement.

But why must we maintain the fault system? We should have a fault system which is simple negligence, just as we do for domestic crashes. That is the obvious and evident answer to the problem.

But even the Warsaw Convention permits us to try to prove willful misconduct, which we do with great success, I might say, and it is the opportunity to go into fault in the Lockerbie litigation that has exposed horrible things to public attention.

Let me just give you an idea. You have all heard about the FAA fines imposed upon Pan American some weeks ago. It was front-page news throughout the country. I can tell you that the FAA has barely scratched the surface of what was wrong with the security system in Frankfurt—barely scratched the surface.

In fact, what our litigation will reveal—and I am somewhat constrained because of the confidentiality order of Chief Judge Platt in the case and what I am teling you is not confidential, because while I may have confirmed it in depositions the information came to me through our litigation investigation.

I can tell you that the relationship between the FAA and Alert Management Systems, which was doing the security for Pan Am in Frankfurt, bordered on collusion.

The nature of this monitoring system whereby the FAA keeps an eye on the airline and those doing security is that periodically

there should be spot checks, and you will find when the information that comes out of our lawsuit is made public, you will hear right now, that every time the FAA showed up for a spot check in Frankfurt, Alert and Pan Am knew that it was coming—particularly Alert, which was actually doing the hands-on security work.

There was a man by the name of Tommy Dome, FAA-Brussels, who headed the FAA team. The head of Alert, Ulrich Webber, and the rest of them at Alert in Frankfurt always knew he was going to be there and they put on a little bit of a show for them. That is part of what the Congress will find out and the FAA will learn, not from the FAA, but from our litigation.

Let me tell you a little bit about Pan American. I cannot go into the details of the deposition. I am not allowed to talk to Pan American employees, but I can give you some conclusions.

You will find from the litigation that Pan Am was an exercise in hopeless disorganization in Frankfurt. For example, the world knows about the warnings, the Helsinki warning and the discovery of the Toshiba radio cassette player bomb.

Pan Am has the affirmative duty to supervise and make their flights secure. Did the warnings ever get to the screeners? No.

We went to the top people, and I will not identify them by name or detail, but we took every top person—we have taken 42 depositions in this case so far and we have deposed every one of the top people at Pan Am in Frankfurt—the head of security, the station manager, the head of passenger services—and we said, "Did you know about the warning?" "Yes, of course."

"Did you tell the screeners? Did you tell the people at Alert about these warnings so that they would look out for Toshiba radio cassette players?" "Well, of course we did." "Did you do it?" "No, I did not do it." "Well, who did it?" "I think it was my assistant." That was witness A.

So, we got to witness B. "Did you know about the warnings?" "Of course we knew about the warnings." "Did Alert know of them?" "Certainly they did." "Did you tell them?" "No, I did not tell them." "Well, who did?" "Passenger services."

We went to A, to B, to C, to D, to E, and at the trial we are going to have a blown-up page from every one of those depositions of all the top people at all involved in security in Pan Am, Lockerbie, and every one is saying he is sure that it was done.

He did not do it, but the next guy did it [indicating] and we are going to have for the jury a big circle which never ends, because everyone is pointing his finger at the next person. That is what you will learn about why Lockerbie happened.

I would like to get to the worst, and then I would like to generalize a little bit.

The CHAIRMAN. Do not forget we do have some time limitations, so generalize as specifically as you can.

Mr. KREINDLER. The people doing the screening in Frankfurt, which is almost certainly where the bomb got on the airplane, were the people at Alert Management Systems. The situation there was absolutely scandalous. It was a cesspool, and I do not exaggerate.

People say that the question in the Lockerbie case is, can an airline adequately protect itself against a terrorist? That is not what

Lockerbie is about. Lockerbie was an invitation for terrorists to come in.

The entire security operation—and this is shown, Senator Kassebaum, by our litigation, by the fault system and the opportunity to prove what happened, which would be abolished by the Montreal protocols—the entire security system run by Alert was in the hands, believe it or not, of a 29-year-old, promiscuous bisexual with a criminal record who hired, who fired, who promoted, and who demoted based on personal relationships, meaning sexual relationships, rather than training and skill and security.

I just got back from Frankfurt, where we took about 16 depositions over a 10-day period. I cannot tell you what is in the depositions, but I can tell you what I knew going into the depositions and I will just give you an example.

One of the screeners at the main counter in Frankfurt, one of the employees of Alert with the responsibility for screening the passengers, deciding who was a selectee and then hand searching the bags, was a young woman by the name of Sabina Fuchs.

She was on duty for one-half hour and actually was part of the loading process for Pan Am 103. She was employed as a screener with no training. At the time of Lockerbie, she had no training.

I asked her if she designated anyone as a selectee and she said, "I could not, Mr. Kreindler, I did not know what a selectee was." Now, you would never know this if it were not for the tort litigation. You would never know this if it were not for the fault system.

You never heard it from the FBI, you never heard it from the FAA. I think Congress ought to look into all of this stuff, and it will, because of the fault system which the Montreal protocols would abolish.

I say to you that the public will not be served by the Montreal protocols. We should defeat the protocols and we should denounce the Warsaw Convention.

One final word and then I will be finished. The Supplemental Compensation Plan under article 35A of the protocols may not impose any additional cost or liability on the airline, other than the liability to pay damages in the amount of $100,000 special drawing rights per passenger.

It is not a supplemental compensation plan. It is a mandatory insurance plan for which the passengers have to pay, and they can give them anything. They can give them gold bricks, if they want to, because they are going to charge the passengers for it.

Sure, just on the eve of this hearing they amended the Supplemental Compensation Plan to provide for noneconomic damages. Big thing they are giving the passengers. What difference does it make? The premiums are going to be paid by the passengers, and if costs $50 a passenger, what does the airline care?

The reason the airlines want to preserve the Warsaw system, the reason they want the Montreal protocols so badly, is they do not like me and my confreres, several of whom are here today, they do not like us digging into the evidence of fault. They do not like us proving what happened and they do not like us getting punitive damages.

I have to disagree a little bit with Mr. Ephraimson-Abt. I know something about the Korean Airlines case. The trial did show what

happened, and it was the litigation system that proved what happened and disproved some of the other stories, such as the spy stories and so forth, that were prevalent.

I thank you very, very much for your consideration.

[The prepared statement of Mr. Kreindler follows:]

## PREPARED STATEMENT OF LEE S. KREINDLER

I am opposed to the ratification of Montreal Protocols 3 & 4, and in favor of United States denunciation of the Warsaw Convention.

### Problems with the present Warsaw Convention

There are two basic problems with the Warsaw Convention:

First, the Convention (as effectively modified by the 1966 Montreal Agreement) limits the liability of airlines absent proof of wilful misconduct. Obviously, there should be no limit on provable damages. There is no reason in justice, logic, or fairness to impose the loss on the victims, rather than on the wrongdoing airline.

Second, in requiring proof of wilful misconduct rather than simple negligence, which is the general standard, to recover fair damages the Convention places a heavy burden on the victim's family. Simple negligence is the universal standard that should be applicable.

The Warsaw Convention is, therefore, destructive of the rights of American airline passengers, and we should get rid of it. It serves no useful purpose whatsoever. I recently addressed a major group of leading London insurance underwriters, the people who will ultimately pay most of the damages in Lockerbie, KAL, and United States domestic airline accidents. Most of them don't like the Warsaw Convention and they are appalled that the United States is still a party to it. Their business is insurance and they will insure against any risk. They do not like to see families uncompensated or undercompensated and they do not like to be in the position of defending an unjust treaty. If the United States would denounce the Warsaw Convention all other countries would follow, and the insurers would not bat an eye. The Convention accomplishes nothing except the limitation of passengers' damages!

### What would be the effect of the Montreal Protocols?

What would the Montreal Protocols do? (Montreal Protocols are technically Montreal Protocols Number 3 and Number 4. Montreal Protocol Number 3 is the important one. It would affect rights to recover for personal injury and wrongful death.)

The Protocols are designed to protect airlines by eliminating the wilful misconduct exception and all other means of avoiding the limit.

Thus, under the Protocol, the limit is raised to 100,000 Special Drawing Rights (SDR's) (approximately $127,000 in today's market) and the wilful misconduct exception is eliminated.

Under the Protocols, therefore, the question of fault is eliminated entirely. This is the real purpose of the Protocols. The airlines do not like American tort lawyers poking around in their record of fault and wrongdoing. The Lockerbie case is the best current example of the effectiveness of the tort system in ferreting out evidence of gross misbehavior on the part of the airlines. The airlines would like to eliminate this, and thus the Protocol eliminates inquiry into fault entirely!

The limitation under the Protocol of 100,000 SDR's is totally and unequivocally unbreakable. Article 35 of the Protocol provides that a country (meaning the United States) can unilaterally impose a "supplementary compensation plan", provided that the plan does not result in more liability or cost to the airline.

Thus, any "supplementary compensation plan", including the one currently being promoted by IATA which would limit payments to "economic loss" and thus deny fair damages to the parents of the students killed in the Lockerbie disaster, is an insurance plan, the premiums for which would be imposed on the passenger.

Right now a passenger can purchase any insurance he or she wants, if he pays the premium. The Montreal Protocol would have the effect of permitting the United States to establish a system of mandatory insurance for which the passengers would pay such premiums as experience dictated. This is wholly different from the normal negligence system, such as we have in domestic airline transportation, under which the airline maintains liability insurance. The pass-through cost to the passengers is pennies, compared to many dollars.

Let's examine the Korean Airlines and Lockerbie cases to see how they would fare under the present system, under the Montreal Protocol system, and if the United States were to defeat the Montreal Protocol and denounce the Warsaw Convention.

## Under the Present System

In both cases passengers can defeat the $75,000 limitation by proof of wilful misconduct. A jury recently returned a verdict of wilful misconduct in the KAL trial in Washington, D.C., and passengers' lawyers are now working hard in developing a wilful misconduct case in the Lockerbie litigation. The proof of gross neglect in Frankfurt in that case is truly astounding.

Experienced plaintiffs' lawyers are generally successful in defeating the Warsaw Convention limitation, even though it is not a simple matter. Many of the cases are settled for substantially more than the limitation amount by virtue of the possibility or probability of defeating the limitation.

Most important is the fact that litigants are able, under the present legal system, to go into the question of fault. The litigation is the most effective investigation into the background of activities that permitted Lockerbie to happen, for example.

## If the Montreal Protocols Are Adopted

If the United States were to adopt the Montreal Protocols, the situation presented would be entirely different.

First, there would be no examination into fault whatsoever. It is simply irrelevant to the Montreal Protocol scheme under which the airline is absolutely liable up to 100,000 SDR's. Thus there would be no discovery at all into the facts leading up to Lockerbie, for example; no exposure of failures in our security system, no exposure of FAA failures to monitor, bordering on collusion with the airline.

Secondly, the odious Warsaw Convention system, under which passengers' recoveries are limited, would be frozen into our law by a new treaty. We would never get rid of it.

Thirdly, while there might be a supplementary compensation plan under which full losses would be insured, there is no telling what this plan would cost or what future premiums for passengers would be, and, in any event, the entire burden of paying for the protection would fall on the passengers, rather than on the airline under a negligence system. Under a negligence system a negligent airline will have its liability insurance premiums increased in the future. Thus there is motivation to prevent accidents and liability payments. Under the Montreal Protocol system the burden would be entirely on the passenger and there would be no incentive on the part of the airline to save insurance costs by reason of safe practices.

## If the Protocols are Defeated

If the United States defeats the Montreal Protocols, as it did once before on the floor of the Senate in 1983, then our Government should denounce the Warsaw Convention. This is not a matter of Democratic or Republican administrations. This is a matter of State Department and airline regulation policy which has been well established over the years. The present system is indefensible in the long run, and before long we would denounce the Warsaw Convention. President Johnson denounced the Warsaw Convention in 1965. The denunciation was withdrawn when the airlines agreed to the "interim" Montreal Agreement under which the airlines agreed to increase the limit to $75,000, and accept absolute liability up to that limit.

Without the Warsaw Convention at all the system would be the same as what we have in domestic airline transportation. Airlines would be liable for their negligence. Fault would be examined into and the recoveries of passengers would not be artificially limited. The venue restrictions of the Warsaw Convention (Article 28) would be eliminated, and, subject to forum non conveniens considerations the plaintiff could bring his or her action wherever he could serve the defendant airline.

Simply stated, I think the position of the United States should be in (1) favor of the fault system which permits investigation into fault and accident causation, and (2) opposition to any artificial limits on recoverable damages.

I am attaching a biographical summary which, among other things, lists many of the Warsaw Convention cases I have handled.

LEE S. KREINDLER
Biographical Data
1989

Lee S. Kreindler is a trial and appellate lawyer specializing in the handling of air crash cases.

He is senior partner of Kreindler & Kreindler, a firm which spends full time on litigation arising out of airline, military, and private airplane crashes, products liability, and cases arising out of industrial accidents and injuries.

Mr. Kreindler is:

Past President and Dean of the International Academy of Trial Lawyers.

A Fellow of the American College of Trial Lawyers.

Former Chairman of the Aviation Litigation Committee of the Litigation Section of the American Bar Association.

Former Chairman of the Aviation Law Section of the Association of Trial Lawyers of America.

Author of Aviation Accident Law, (two volumes; Matthew Bender; 1963, revised 1971, updated yearly), and numerous law review, law journal and bar publication articles on aviation law.

Mr. Kreindler has been appointed Lead Counsel and Chairman of the Plaintiffs' Committee in the Pan Am 103 Lockerbie litigation. He is also serving as one of the lead counsel in the Multi-District Litigation arising out of the Northwest Airlines MD-80 crash in Detroit in 1987 and has served as Lead Counsel or Member of the Plaintiffs' Steering Committee in Multi-District Litigation arising out of* Turkish Airlines DC-10 crash in Paris, 1974; Air India 747 crash in Bombay, 1978; the American Airlines DC-10 crash in Chicago, 1979; the Delta Airlines L-1011 crash in Dallas-Fort Worth, Texas, 1985; and the *Arrow Air DC-8 crash in Gander, Newfoundland, 1985.

In addition, Mr. Kreindler or members of his firm, are acting as, or have acted as Plaintiffs' Lead Counsel or Member of the Plaintiffs' Steering Committee in Multi-District cases arising out of: * the Pan American 747 terrorist incident in Karachi, Pakistan in September 1986, involving the adequacy of the Pan Am security system; Allegheny Airlines, Tweed-New Haven Airport, 1971; Eastern Airlines Lockheed 1011, Florida Everglades, 1971; Piedmont Airlines Midair Collision, Hendersonville, North Carolina, 1967; and Korean Airlines 747 Shootdown, 1983.

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*Litigation involving the Warsaw Convention is marked with an asterik.

Mr. Kreindler or members of his firm have also taken a leading role on the side of the plaintiffs in the following additional major airline crash cases:

National Airlines DC-6, Elizabeth, New Jersey, 1952
American Airlines Convair, Albany, New York, 1954
Northeast Airlines DC-6, Rikers Island, New York, 1954
Eastern Airlines Constellation, Jacksonville, Florida, 1955
*LAI DC-6, Idlewild Airport, New York, 1956
Northeast Airlines Convair, Nantucket, Massachusetts, 1958
United Airlines-TWA Midair collision, Brooklyn-Staten Island, New York, 1960
Eastern Airlines DC-7, Idlewild Airport, New York, 1962
*Sabena 707, Brussels, 1961
United Airlines DC-8, Stapleton Field, Denver, 1962
Eastern Airlines Lockheed Electra, Boston, Massachusetts, 1964
American Airlines 727, Jamaica Bay, New York, 1964
Eastern Airlines-Pan American Collision, Jones Beach, New York, 1965
*Air France 707, Orly Airport, Paris, 1965
American Airlines 727, Cincinnati, Ohio, 1966
*TWA Constellation, Milan, Italy, 1966
*Aeronaves de Mexico, Mexico City, 1966
Pan American 707, Elkton, Maryland, 1964
*British European Airways Trident, Staines, England, 1971
Delta Airlines DC-9, Boston, Massachusetts, 1973
*TWA 707 Ionian Sea bombing, 1974
*Pan American 707, Bali, 1974
Allegheny Airlines Midair Collision, Indianapolis, 1976
Eastern Airlines 727, JFK Airport, New York, 1976
*Pan American-KLM Collision, Tenerife, Canary Island, 1977
Southern Airways DC-9, New Hope, Georgia, 1977
*LOT Polish Airlines, Warsaw, Poland, 1980
Air Florida 737, Washington, D.C., 1982
*Air Canada DC-9, Covington, Kentucky, 1983
World Airways DC-8, Logan Airport, Boston, Massachusetts, 1982
*TWA Hijacking, Beirut, 1986

Lee Kreindler has been plaintiffs' counsel in precedent-making aviation law cases including: Griffith v. United Air Lines, (Pa.) and Long v. Pan American, (N.Y.): the law of the state with the most significant relationship will be applied rather than the lex loci delicti. Kilberg v. Northeast Airlines, (N.Y.): limitation on wrongful death damages held unenforceable. Citrola v. Eastern Air Lines (2d Cir.) and Abbott v. Page Airways, (N.Y.Ct. of Appeals); res ipsa loquitur compatible with specific proof of negligence. Brown v. United States, (U.S.Sup.Ct.): receipt of veterans' compensation no bar to Federal Tort Claims Act suit. Merrill v. United Air Lines, (So. Dist. N.Y.): expert testimony admissible to prove value of services of deceased wife-mother. Rothenberg v. United Air Lines, (So. Dist. N.Y.): Elizabeth, New Jersey "reversed propeller" accident solved by Mr. Kreindler in this litigation. Scotti v. National Airlines, (E.Dist. N.Y.): deposition taken in other action held usable. Prashker v. U.S. Guarantee, (N.Y. Ct. App): airplane insurer must defend action notwithstanding exclusionary clause. Van Dusen v. Barrack, (U.S. Supreme Ct.): Mr. Kreindler was a participating lawyer in this case which held that the law of the transferor state applies to transferred cases. Ingham v. Eastern Airlines and United States, (2d Cir.): United States liable for failure of air traffic controllers to give aircraft accurate weather information. In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980, (2d Cir.) and In re Air Crash Disaster at Malaga, Spain on September 13, 1982, (E. Dist. N.Y.): Airline liable under Warsaw convention based on inadequacy of ticket. In re Arrow Air Disaster at Gander, Newfoundland on December 12, 1985 (W.D. KY): Airline liable for failure to deliver tickets.

**Lee Kreindler led the successful public effort from 1966 to 1983 to draw attention to and defeat the Montreal Protocols to the Warsaw Convention, the first time in thirty years a proposed treaty has been defeated on the floor of the United States Senate.**

Lee Kreindler has been on the program as a featured speaker at conventions of the American Bar Association throughout the country. He has also given numerous talks to local bar association groups and aviation organizations throughout the country and overseas, including the Royal Aeronautical Society, London, England (1967, 1971 and 1972); the Johannesburg Bar Association, Johannesburg, South Africa (1968); and the Kenya Law Society, Nairobi, East Africa (1968). He has frequently spoken at national conventions of the American Trial Lawyers Association and to regional and local groups, and he has lectured for the Practicing Law Institute, and at law schools and colleges including Oxford, Columbia University, Harvard, New York University, the University of Pennsylvania, Tennessee, Wichita and Arizona, Southern Methodist University, George Washington University, and the University of Witwaterstrand, South Africa, among others.

Bar Admissions:

New York Bar - 1949
Supreme Court, United States
U.S. Court of Appeals, 2nd Circuit
U.S. Court of Appeals, 3rd Circuit
U.S. Court of Appeals, 5th Circuit
U.S. Court of Appeals, 6th Circuit
U.S. Court of Appeals, 7th Circuit
U.S. Court of Appeals, 9th Circuit
U.S. District Courts, Southern and Eastern Districts of New York

Educational Background:

Dartmouth College, A.B., 1945
Harvard Law School, L.L.B., 1949

The CHAIRMAN. I understand Ms. Bright has a statement to add.

## STATEMENT OF ELEANOR BRIGHT, FAMILY OF PAN AM 103 VICTIMS

Ms. BRIGHT. Yes. I also have a statement that I would like to submit, but I would like to speak very briefly about the treaty and how it impacts me.

The CHAIRMAN. Would you bring the microphone a little closer still if you would, please?

Ms. BRIGHT. I am a member of the board of directors, which is officially neutral—the board of directors for the families, victims of Pan Am Flight 103, which is officially neutral on this subject, and I would just like to speak for myself today.

My husband, Nicholas Bright, was killed when a bomb exploded aboard Pan Am Flight 103. He was 32 years old, and he was a 1984 graduate of the Harvard Business School.

He was a manager at the well respected consulting firm of Bain & Co., where he earned a 6-figure salary. Within 1 year he was to have become a partner and his income potential would have been unlimited.

It was very important to my husband to build financial security for his family and sort of mixed into financial security was providing an education for our children. We have one son who was 15 months old when my husband was killed. We wanted for him what our parents had given us: a private primary school education and college, if that was what he wanted.

The present value of that education is $50,000 for a primary school and $65,000 for college. Relative to educational costs alone, the limitations placed on recovery for the Warsaw Treaty are unfair and unreasonable.

A disability policy that my husband had through his employer provides me with income for 5 years following his death, but the insurance company has a claim on any settlement that I receive and because over 5 years I will receive in excess of $75,000, I may end up with nothing.

Mr. Kreindler talked a lot about the special drawing rights and eliminating the willful misconduct, and I really cannot add anything to what he said, except to agree with him wholeheartedly that if these protocols had been passed prior to the bombing we never would have learned how inadequate security was and is at Alert Security in Frankfurt and elsewhere.

Taking away the forum for civilian laws would have a very negative impact on airline security and would greatly reduce any incentive to develop better security methods and technology in the future.

Just last week Thomas Plaskett, chairman, chief executive and president of Pan Am, criticized the Government's requirement that U.S. air carriers x-ray check baggage and interview passengers for security purposes on international flights. To me, this is a very clear attitude that our air carriers need a financial incentive to act, and the treaty and the proposed protocols do not provide any type of incentive.

As Mr. Kreindler said, the supplemental policies that would award victims and victims' families would be paid for by the passengers, and I do not feel that it is right that the passengers should have to pay for their own insurance. I feel very strongly that without the Warsaw Treaty, American airlines would be kept in check simply by the ever-present threat of financial losses resulting from lawsuits just like the ones against Pan Am today.

[The prepared statement of Ms. Bright follows:]

PREPARED STATEMENT OF ELEANOR BRIGHT

I would like to thank the Senators for inviting me to speak before them today.

On December 21, 1988, my husband Nicholas Bright was murdered when a bomb on Pan American flight 103 exploded over Lockerbie, Scotland.

Since that night almost 11 months ago, Nicholas, our son and I have become victims. We are victims of a terrorist bomb that took Nicholas' life. We are the victims of Pan American Airlines and its subsidiary Alert Security whose incompetent and careless attitudes resulted in the deaths of 270 innocent people. We are the victims of the State Department whose neglect and unkind treatment has made me question

my importance as a U.S. citizen. Now too, it seems that we are victims of the Warsaw Treaty.

Shortly after my husband's death, I learned of the Warsaw Treaty and of the limits and conditions that it puts on the allowable recovery in lawsuits involving international flights. While the maximum amount of $75,000 is not an insignificant sum, it must be looked at relative to the individual involved. While it is distasteful to consider an individual's value in economic terms, I believe that for the moment we must.

My husband, Nicholas, a gentle man, a man of dignity and honor. He was 32 years old and was a 1984 graduate of the Harvard Business School. As a manager at the well-respected consulting firm of Bain & Co., Nicholas earned a six-figure salary. Within 1 year he was to have become a partner and his income potential would have been unlimited.

Nicholas' main concern was for his family. His primary goal was to build financial security for us. When evaluating our financial objectives, we made out children's education our top priority. We wanted to give them what our parents had given us; a private education and college if that was what they wanted.

The four children that we had planned will never be. Our only child, a son, is now just 2 years old. As he grows older, the 15 months that he and his father had together will forever fade from his memory. So, it seems, that because of the limitation under the Warsaw Treaty, many of those things that my husband and I wanted for him will fade away.

The cost, in today's dollars, of a private primary school education for one child is about $50,000. The cost of a 4-year college education approximately $55,000. Relative to educational costs alone, the limitations placed on recovery under the Warsaw Treaty are unfair and unreasonable.

Under Nicholas' disability insurance, I am entitled to receive income for 5 years following his death and the insurance company has a claim against my settlement that I receive. It is conceivable then that, because they will have paid me in excess of $75,000 over 5 years, that my son and I will end up without any financial retribution at all.

While the proposed changes in the Warsaw Treaty, Montreal Protocols 3 and 4 would raise the recovery to 100,000 special drawing rights or about $130,000 in today's market and the willful misconduct exception would be eliminated, there would be no possibility for examination of fault on the part of the airline. If these protocols had been passed prior to the bombing of Pan Am 103, we would never have learned how inadequate security was and is at Alert Security in Frankfurt and elsewhere.

Taking away the forum for a civilian lawsuit would have a very negative impact on airline security today and would greatly reduce any incentive to develop better security methods and technology in the future. Just last week, Thomas Plaskett, chairman, chief executive, and president of Pan Am criticized the Government's requirement that U.S. carriers x-ray checked baggage and interview passengers for security purposes on international flights. It is clear from this attitude that our air carriers need a financial incentive to act. The treaty and the proposed protocols do not provide such an incentive.

When evaluating the Warsaw Treaty, one must consider the emotional impact as well as the financial one. Everyday, I wonder if Nicholas was in pain or if he was afraid. I imagine him falling to the earth and I see him lying in that Scottish field. Every morning I awake with the thought that my husband is dead. Every new developmental step in our son's life brings sadness because Nicholas will never know the job that I feel. I mourn the fact that our son will never really know his father.

At its inception, the purpose of the treaty was to protect fledgling airlines. Now, I submit, it is the passengers who need to be protected. The changes proposed under the Montreal protocol are a disgrace. The supplemental compensation plan is not compensation from the airlines, but insurance the passengers would pay for. It is not the passengers' responsibility to pay for their own life insurance. To prevent any airline passenger or [illegible] survivors from using the legal system to find fault or to learn all of the facts is, I believe, an affront to the American judicial system.

Without the Warsaw Treaty, American's airlines would be kept in check simply by the ever present threat of financial losses resulting from lawsuits like those against Pan Am today.

The CHAIRMAN. Thank you very much indeed, Ms. Bright.

Ms. Flynn, did you want to add a word?

## STATEMENT OF KATHLEEN R. FLYNN, MEMBER, BOARD OF DIRECTORS, FAMILIES OF PAN AM 103/LOCKERBIE

Ms. FLYNN. Yes, I do.

Members of the Senate Foreign Relations Committee, I wish I could employ the usual rhetoric and say it is an honor to speak before you this morning, but I cannot for I am here not because of my expertise on this subject matter but because of the personal tragedy inflicted upon my family and others by the bombing of Pan Am 103.

I speak to you this morning not only as a mother but as a member of the board of directors of Families of Pan Am 103/Lockerbie. My remarks are individual, but I do speak for many families who are in agreement with my comments and wish to be heard in this forum.

On December 21, our lives were totally shattered by the loss of our eldest son over Lockerbie, Scotland. The bombing of Pan Am 103 was the largest single act of terrorism against civilians in modern day history. Yet, 11 months later, we still have no definitive answers or actions. Our Government and the governments of many of our allies have chosen to ignore this act of barbarism in the hope that if we ignore it it might go away.

To humanize the loss of lives on Pan Am 103, allow me to give you some background data on my son. J.P. was the oldest of four children. He was a junior at Colgate University in Hamilton, NY, studying for a semester abroad with the Syracuse program in London in the areas of economics and geography.

Jay was considered a scholar, athlete, and, by his peers and associates, a man of quiet leadership, courage, and good moral fiber. There was an entire plane filled with people like J.P. Flynn whose lives were wasted by a wanton act of terrorism and incredible lack of proper security.

The question arises, who is responsible for this heinous act? The issue of culpability must be addressed on four levels. Obviously, the airline is responsible. They allowed the bomb on the plane; the governments or the government who ignored the warnings; the terrorists who built the bomb and put it on the plane; and the state that sponsored that terrorism are guilty.

But to designate that culpability, one must have a tool to ferret out that information and evidence and hold the guilty parties accountable. Under the proposed Montreal Protocols to the Warsaw Convention, this tool for culpability will be destroyed by a no-fault designation to airlines. I am incensed at that very concept.

Again, to personalize the scenario, allow me to focus on Pan Am 103. Much of the strongest evidence of wrongdoing or, in legislative jargon, willful misconduct, has been uncovered as a result of the investigation by the Plaintiffs' Committee of lawyers in our litigation against Pan Am.

The issue of security must also be addressed with regard to the Montreal protocols. Again, let me focus on Pan Am 103.

Here is an airline in otherwise financial turmoil in 1968 who was warned by a comprehensive study of its security operations by a former El Al security expert that their security was grossly inadequate and that they were an easy target for terrorist attack.

Again, the almighty dollar was more important than the lives of the passengers and their employees.

The concept of limited compensation, again put forth by the Warsaw Convention, does not encourage or force airlines to increase security because there is no financial pressure on them from the insurance companies or the government.

I think Mrs. Bright addressed Mr. Plaskett's comments last week in the New York Times about the fact that he had to add security measures. Now does this company sound like people interested in protecting the American flying public?

Again, the plan under consideration to increase the compensation to approximately $125,000 places the burden of responsibility on the American flying public. Why should the American flying public have to pay for a mandatory insurance plan when it is the airline's responsibility?

Finally, this no-fault concept is a moral issue. As a member of the Families of Pan Am 103/Lockerbie and a member of the board of directors, I have knocked on your doors, Senators, begging, pleading for a congressional investigation into the events surrounding the bombing of Pan Am 103. There was incredible resistance on the part of the administration and the Congress to examine this issue in its entirety.

Yes, there have been hearings on the Hill but with splintered information. Only after the American people were subjected to another act of barbarism was any action taken by our Government. The videotape depicting the hanging of Lt. Col. William Higgins finally triggered a Presidential commission on aviation security and terrorism. Finally we were given a forum for examination surrounding these bizarre and quite possibly criminal actions of the downing of Pan Am 103.

My point is we had to fight hard and long for this investigation. What about other victims who do not have the resources nor the perseverance to challenge the system? What is their recourse? That is why I feel so strongly that the American people have the right to have their day in court.

People and airlines must be held accountable. If you or I were running the security situation in Frankfurt 2 weeks prior to Christmas, we would know what to look for just as Pan Am knew what to look for. A Toshiba radio cassette player is not too difficult to spot. I would hope that we would open every bag and find that bomb.

I also feel from a moral standpoint we would not have exercised selective notification. Are the members of the diplomatic corps' lives more important or more valuable than John Patrick Flynn, Nicholas Bright, and the other 268 victims? I think not. The value of life cannot be measured in monetary terms, but our loss is so overwhelming that we must speak out in order that other families may never know this pain.

Culpability must be addressed, and if the forum is in the civil courts, I for one want my day in court.

Thank you.

[The prepared statement of Ms. Flynn follows:]

## PREPARED STATEMENT OF KATHLEEN R. FLYNN

It is with a deep sense of frustration and outrage that I come before you this morning to share the personal tragedy inflicted upon our family by the bombing of Pan Am 103. I am a Board Member of Families of PA 103/Lockerbie, which has not taken a position on the Montreal Protocols. I speak to you today as an individual, the mother of one of the victims.

On December 21, 1988 our lives were totally shattered by the loss of our eldest son over Lockerbie, Scotland. The bombing of Pan Am 103 was the largest single act of terrorism against civilians in modern day history. And yet, eleven months later, we still have no definitive answers nor actions. 259 innocent people on their way home for Christmas were blown up in mid air at 31,000 feet as were 11 people on the ground in a tiny village in Scotland. Our government and the governments of many of our allies have chosen to ignore this "act of barbarism" in the hopes that if we ignore it, it might go away.

To humanize the loss of life on Pan Am 103, allow me to give you some background data on our son. J.P. was the eldest of our four children. He is survived by his brother, Brian, a junior at Georgetown University here in Washington, and his twin sisters, Chrissy and Kerry, 15, sophomores at Georgetown Visitation also located in Washington. John Patrick Flynn was a junior at Colgate University in Hamilton, New York and was studying for a semester abroad with the Syracuse Program in London in the areas of Economics and Geography. J.P. was considered a scholar athlete who lettered in three sports in high school and was a national merit commended student. He was quarterback of the football team, captain of the basketball and tennis teams. He also played basketball for Colgate for two years and was considered by his peers and associates to be a man of quiet leadership, courage and good moral fiber. His prognosis: a rewarding future and perhaps ready to make a difference in this world.

There was an entire plane filled with people like J.P. Flynn whose lives were wasted by a wanton act of terrorism and incredible lack of proper security.

The question arises - who is responsible for this heinous act? The issue of culpability must be addressed on four levels. Obviously, the airline and the people who "allowed the bomb" on the plane are responsible. Moreover, the government or governments who ignored the specific warnings are responsible, the terrorists who conceived the plot for the destruction of Pan Am 103, the followers who engineered and built the bomb are responsible, and lastly, the nation that gave the go ahead and the finances to kill 270 people are guilty of mass murder and must be brought to justice.

Therefore, to designate culpability, one must have a "tool" to ferret out the information aid evidence and hold the guilty parties accountable for their actions.

Under the proposed Montreal Protocols to the Warsaw Convention this "tool" for culpability will by destroyed by a "no-fault" designation to airlines. I am incensed at this very concept. To think that in our democratic society, where the values of justice and fair play are part of the American Way, we would even think of denying Americans a forum for accountability of actions almost smacks of collusion. It smacks of collusion between government and big business and leaves the flying public unable to find out the truth in a disaster, such as Pan Am 103.

To personalize this scenario, allow me to focus on Pan Am 103. Much of the strongest evidence of wrongdoing, or in legalistic jargon, "willful misconduct" has been uncovered as a result of the investigations by the plaintiffs' committee in our litigation against Pan Am. To deny victims' families the right to the truth and the inability to sue Pan Am for their gross incompetence and negligence is beyond my comprehension.

The issue of security must also be addressed with regard to the Montreal Protocols of the Warsaw Convention. Again, let me

focus on Pan Am 103. Here is an airline in obvious financial turmoil, who in 1986 was warned in a comprehensive study of its security operations by a former El Al security expert that their security was grossly inadequate and that they would be an "easy target" for terrorists attacks. Because of Pan Am's poor economic health, they choose to do nothing. Obviously, the "Almighty Dollar" was more important than the lives of their passengers and their own employees.

The mentality of limited compensation for evil deeds as presently stated in the Warsaw Convention does not encourage or force airlines to increase security because there is no financial pressure on them from the insurance companies or the government. The only recourse is to sue the airline for punitive damages and hit them so hard financially that they will reconsider their callous attitude toward the loss of human life. Again to personalize about Pan Am 103. Mr. Plaskett, Chairman of Pan Am, only last week in the New York Times remarked how unfair it was his airline had to take added security measures, which for the sake of discussion are still totally inadequate. Does this sound like a man or a company interested in protecting the American flying public?

The plan under consideration to increase the compensation to approximately $126,000 for victims with an added supplemental compensation plan only places the burden or responsibility back on the American public. Why should the American flying public have to pay for a mandatory insurance plan when it is the airline's responsibility? If people choose to carry more insurance, let them take out a policy at the airport or even simpler, pay by credit card.

This "no-fault" concept is a moral issue. As a member of the Families of Pan Am 103/ Lockerbie, and a member of its Board of Directors, I have knocked on your doors, Senators, begging, pleading for a Congressional Investigation into the events surrounding the bombing of Pan Am 103. There was incredi-

ble resistance on the part of the Administration and the Congress to examine this issue in its entirety and demand accountability. Yes, there have been hearings on the Hill, but with splintered information in each sessions and to date, I have seen no focus, no reports, no recommendations, no demand for the truth. Only after the American people were subjected to another act of barbarism was any action taken by our government. The video tape depicting the hanging of Lt. Col. William Higgins triggered the establishment of the Presidential Commission on Aviation Security and Terrorism. With the help of your leadership, Senators Mitchell and Dole, we were finally given a forum for examination of the bizarre and quite possibly the criminal actions surrounding the downing of Pan Am 103. My point is: we had to fight long and hard for this investigation, what about other victims who do not have the resources nor the perseverance to challenge the system? What is their recourse? That is why I feel so strongly that the American people must have the right to have their day in court.

People, and in the case of Pan Am 103, corporations must be held accountable for their actions or in this case, their lack of action in heeding the warnings surrounding that deadly flight. Pan Am knew what to look for -- a Toshiba Radio Cassette Player is not too difficult to spot. I would hope that if you or I were running security two weeks prior to Christmas in Frankfurt, we would have searched every bag and found that bomb. I also feel from a moral standpoint, we would not have exercised selective notification. Are the members of the diplomatic corps' lives more valuable than John Patrick Flynn and the other 269 victims? I think not! The value of life obviously cannot be measured in monetary terms, but our loss is so overwhelming that we must speak out in order that other families may never know this pain.

Where does this leave us with regard to the Montreal Protocols and the Warsaw Convention? Perhaps the recent upheavals throughout the world are teaching us a lesson -- that the global community is ready to install new guidelines of interna-

tional law that will establish culpability for heinous crimes committed against innocent victims in our supposed civilized society. However, a utopian society does not exist and the reality is that people and in the larger sense, corporations and governments must be held responsible for their actions. Culpability must be addressed and if the forum is in the civil courts, I, for one, want my day in court.

Thank you.

The CHAIRMAN. Thank you very much.

Now we come to some questions. First, to the panel that wants to see the Montreal protocols passed, I would ask them what would be the effect if they are not passed, if we take no action?

Mr. Landry.

Mr. LANDRY. As has been indicated here several times this morning, if the underlying Warsaw Convention were to remain in place, then the ordinary amount of damages that the passenger could be awarded for death or injury would be kept at $75,000 unless you could prove willful misconduct, which, as has been indicated, has taken 6 years in the case of Korean Airlines, and that is now subject to appeal. And in another case, a Pan American crash in 1974, two passengers on that aircraft have just been awarded this past summer willful misconduct damages. That was a 15-year wait.

Now if the convention were to be denounced as Mr. Shane mentioned as a possibility here this morning, aside from the tremendous international damage that would be done to the United States by taking that step, the passengers would be left to hope that their lawyers could, first of all, get them into a U.S. court. In many cases that would be not be possible; or in other cases, when they did get them into a U.S. court, because of the conflict of laws, they would have to apply the law of some other foreign country where damages might be considerably lower.

The CHAIRMAN. Thank you very much.

Mr. Kreindler.

Mr. KREINDLER. Jim Landry is an old friend of mine largely because of this subject, but his last statement is utter nonsense.

If the protocols are defeated, I think it is quite clear that the convention will be denounced just as the United States denounced it—renounced is a more accurate phrase, but they say denounce—in 1965. Without the convention, we would do exactly what we do in domestic aviation. We have cases from all over the world today where the convention does not apply for lots of reasons, Senator Kassebaum, including the fact that not all countries are parties to the Warsaw Convention.

Generally speaking, it is a simple matter to sue virtually any airline in the world in the United States. There are forum nonconveniens rules which come into play, but insofar as Americans are concerned who can sue a foreign airline in the United States, you can

forget about them because the courts are not going to deny Americans the use of American courts.

So, the answer, plain and simple, is that absent the convention we would be a lot better off. Americans would be protected the way they are in domestic aviation. The fault system would be preserved to bring to the surface all bad things such as has happened in Lockerbie.

The CHAIRMAN. You described the situation in Frankfurt as scandalous. I was wondering if you could be more specific. Why is it scandalous?

Mr. KREINDLER. I am talking about the Pan American security system as it existed in Frankfort on December 21, 1988. Pan American was responsible for security at that time, the entire security operation, the screening operation.

That is to say the guarding of the aircraft, the guarding of the access doors to the aircraft, the surveillance of catering service people, the x-raying of bags, and the review, the interrogation of passengers, and the examination of the bags was done by the subsidiary company called Alert Management Systems.

Alert, as I said before, was absolutely dictatorially run by this man. His name was Webber, who I described earlier. He was an irresponsible person. The people who were doing the jobs had not been properly trained. In many instances they did not know what they were doing. They did not know what they were looking for.

I could give you some wonderful examples which come out of the depositions, but I have a confidentiality order to deal with. But when the facts become known about how the x-raying was being performed and the kind of machinery they were using and what they could detect with that kind of equipment, it is appaling.

Just consider, Senator, the one example I gave. Sabina Fuchs, a screener at the main counter, whose job it was to examine the passengers, a key element, she had no training and she had been hired by this man Webber.

I will just give you one more example of a young woman, 19 years old, who was hired a week after Lockerbie with zero training, zero instruction, and 5 days later she was made a supervisor. There are people there who have gotten to be supervisors for a year and a half. Her name is Keller. I said, "Simone"—and this is before the deposition—"Simone, how is it that you could be hired and put on the job as a screener with no training or no instruction and then promoted to supervisor?"

And she said, and you want to know why it is scandalous, Senator Pell, she said, "Well, Herr Webber, he looked into my eyes"—and she is a beautiful, beautiful woman—I took her deposition on videotape—"Herr Webber, he looked into my eyes and he said, 'I can tell from your eyes you are qualified.' "

Now, this is a scandalous situation, Senator Pell. This man—Pan Am was responsible to do background checks on these people. The man in charge, Webber, had a criminal record here in the United States. And I am talking about a felony which, of course, is well documented.

The CHAIRMAN. Thank you very much. I would turn now to Senator Kassebaum.

Senator KASSEBAUM. Mr. Kreindler, I would like to ask if, for instance, the Warsaw Convention were renounced, if we weren't operating under it now, how would the litigation be proceeding on the KAL–007 case?

Mr. KREINDLER. If we were dealing with this in the absence of the Warsaw Convention, in my judgment Eleanor Bright would have her money now.

Senator KASSEBAUM. No, no. I am talking about KAL–007.

Mr. KREINDLER. It is the same thing.

Senator KASSEBAUM. How, for example, would things be different?

Mr. KREINDLER. Well, under a simple negligence system, there is almost immediate recognition of an exposure of an airline through its insurer of responsibility and almost immediately in non-Warsaw cases very substantial offers have been made.

In the Pan Am Lockerbie case, for example——

Senator KASSEBAUM. But I want KAL–007. How would negligence be proved in the case of KAL–007?

Mr. KREINDLER. Well, negligence is proven simply by virtue of the existence of the navigational systems. There are three INS systems, and there are checks and balances. So, if the crew does its job, it is impossible to take off with these systems miss set.

Then when they get to the first checkpoint, some 100 miles down the road, they have cross-checks to navigational facilities, and it is physically impossible to continue without knowing of the mistakes.

Now, what happened in the case of KAL was that a mistake was made in programming the INS on takeoff from Anchorage. The mistake must have been realized very quickly, but the crew decided that it would take a chance. It intentionally tried to fake it to Korea and, as we all know, it unfortunately made a mistake. That is what happened, and that is fairly evident to the insurers for Korean Airlines. Money would have been offered in large amounts immediately.

Now, others, some plaintiffs might have chosen to go to trial to get adequate or more adequate damages. But in terms of real, provable damages, I mean, I do not want to use poor Eleanor who has suffered here today as a horrible example, but in her kind of case absent the Warsaw Convention many millions of dollars would have been offered to her within a month after the accident, and the same for KAL–007.

Senator KASSEBAUM. Well, we would not have gone through the litigation process in which we could have gotten all of this information; is that right?

Mr. KREINDLER. No, no, no. The litigation process would have produced the settlement offers. The settlement offers would not necessarily have been accepted in all cases.

Senator KASSEBAUM. The litigation process is a lengthy, lengthy process, Mr. Kreindler, as you know.

Mr. KREINDLER. Yes, I know. It is not so very lengthy in Lockerbie. I can tell you that we have already completed 42 depositions, and the only thing holding us up from going to trial in June—we have a June trial date—is the fact that so far we cannot get access to the Scottish criminal investigation material.

Senator KASSEBAUM. Well, that is true because they are undertaking some very serious efforts to try to get to the root of this.

Mr. KREINDLER. And quite properly. I am not criticizing them.

Senator KASSEBAUM. This is one of the reasons I would just say to Mrs. Flynn that we have been somewhat reluctant up here in some of these hearings because I think any of you would agree not only is it an effort to make sure that safety procedures are continually being upgraded and improved, but in this instance getting at the root of who committed the terrorist act.

Mr. KREINDLER. I could not agree with you more.

Senator KASSEBAUM. And that, of course, has been very sensitive material.

Mr. KREINDLER. Absolutely, and we had to do it and we shall do it. But again, absent the treaty, Senator, these folks would have been offered a lot of money very early on, and it would have been their option to accept it. I mean, I handled plenty of non-Warsaw cases, and I can tell you what happens.

Senator KASSEBAUM. Well, I think all of us would agree. There is no disagreement that the tragedy of the families is something that I think has been put through the ringer whether we are abiding by the Warsaw Convention or we are not, and I tend to think that it has been used as an excuse for reasons that one would have to answer oneself on whether we are able to handle this in a propitious manner.

I personally believe that without passage of the Montreal protocols we are simply going to see further lengthy delays. You know, you may be right. But I think with the world of aviation as it is today, it clearly just does not make sense to say that the litigation process is the only source of information.

Mr. KREINDLER. It is in Lockerbie.

Senator KASSEBAUM. I think in both KAL 007 and in Pan Am 103 that is not the only source of information. We have our investigative sources still continually at work, and they will be at work.

Mr. KREINDLER. I think the Lockerbie speaks for itself. Let me assure you, first of all, that I have nothing to do with the victims' group. I have kept an arm's-length distance from both of them. They have their thing to do and I have my thing in the litigation, but I can tell you because many of these families are my clients that they desperately want to find out what happened so that it will never happen to other people, and there is nothing phony about that.

They believe that it is necessary to ferret out the facts, and it is necessary to correct the evils and the failures so that this never will happen again, and they feel that very, very strongly.

Senator KASSEBAUM. Well, I think everybody does. And, of course, that is the purpose of this hearing and trying to sort through what will be most feasible.

It is just enormously frustrating. We went through this in 1983. You say if we have passed the Montreal protocols, ratified the Montreal protocols at that time, we, of course, would never be able to get just compensation.

Mr. KREINDLER. I think the problem in 1983 was that Senator Baker managed to keep the protocols on the calendar of the Senate. What should have happened in 1983 after the protocols

were defeated in the United States should have denounced the Warsaw Convention and then these folks, those of whom wanted to settle, would have had their money, and we would preserve the benefits of the negligence fault system.

Senator KASSEBAUM. Mr. Styles or Mr. Landry, would anyone else care to comment?

Mr. EPHRAIMSON-ABT. I am not an attorney. I am only the father of a daughter who has perished on KAL–007 in 1983, but I have been exposed to international commerce and international relations for 40 years. So, while Mr. Kreindler disagrees with me, I have in another field, an international field, quite a bit of experience.

I would feel a lot more comfortable taking a plane where frequent fliers if I would know and where other passengers would know that there is an international convention which preserves their rights. And as unsatisfactory as such an international convention may be with a supplemental plan and all of the other financial recoveries, those are the only recoveries which are ever possible.

Unfortunately, we cannot replace the victims. You can never replace my daughter and Mrs. Bright's husband and Mrs. Flynn's child, nor the 30 other children of Syracuse University who died there and the 22 children under 10 years old in our case. You cannot replace them with money, but the only thing which a family can get is financial recovery in order that the children can be educated and the mothers do not have to go out to work and can take care of themselves and so that old people can take care of their old age.

So, there is an absolute need for some protection, and they do not have to be exposed to U.S. courts on international flights. U.S. courts are more liberal in their interpretation. We are the only country in the world where we can go to court if something happens in Karachi, Pakistan, or over Sakhalin Island. We should be very thankful for it.

No other country provides this protection. Germany does not provide it, England does not provide it. You would have to go to Sakhalin Island to sue there, which is impossible. So, we need an international agreement.

Furthermore, gentlemen, we live in a global world. The United States had the luxury not to join the League of Nations after World War I, but today we live in a fast changing global world, and as unsatisfactory as the Warsaw Convention is and as the Montreal protocols might be, we have ways to update it, and we have to give other countries a feeling that we do not set ourselves apart.

In fact, a cousin of mine who was a high official in the European community the other day told me in New York you are all very great in working with us on international agreements, and you make tremendous contributions, but when it comes to ratification, you seldom ratify them.

We are part of a global community. We are part of a world community, and we need a global security system in which the United States is a leading part, is an example, and is a part which shows that it takes care and cares for surviving families and victims.

Mr. LANDRY. Senator Kassebaum, as an alumnus of an intelligence agency, I would like to agree with you. I have a great deal of faith in the ability of a good intelligence agency to get to the root of Lockerbie, and in that particular case, as you know, we have some of the world's finest intelligence agencies doing just that and working on it.

They do not share their information as the thing goes on, but when they have found a perpetrator of these crimes, he will be brought to justice and you in the U.S. Congress has also now added a Presidential commission to investigate the crash.

I think that that combination of fine intelligence agencies and the Presidential commission will get to the root of this, not the tort system.

Ms. BRIGHT. May I say something?

Ms. FLYNN. May I comment?

Ms. BRIGHT. I agree with the gentleman at the end that no amount of financial retribution would ever bring back the people that we have lost. But I think the really important thing here is that the changes in the Warsaw Treaty would take away the forum, our right to know what really happened.

Yes, the Scottish officials are doing an outstanding job in investigating who is responsible, but they are really only looking into who the terrorists were. We need to have a system like the system that we have today with people like Mr. Kreindler who can find out who didn't act responsibly, specifically in this case Pan Am.

Terrorists have been around for a long time. They will always be around. It is an airline's responsibility to act proactively, not reactively. And as far as I am concerned, the only way to do that, to force an airline to act that way, is if they have something on the line and whether it is financial or whether it is finding out what really happened, I think that by eliminating that forum you are doing a great injustice to American travelers today.

Senator KASSEBAUM. Well, I do not think anyone is trying to eliminate the forum because in determining under the Montreal Protocols the assessment of damages, you are at that point able to sort through all of the problems that exist.

I am not making a case for the airline either.

Ms. BRIGHT. But the Montreal protocols would take away the passengers right to use the legal system as a forum. The airline would assume fault and by assuming fault, by assuming responsibility the airline is taking away any option to find out what really happened, in this case what Pan Am was not doing. In using the legal system you are making Pan Am and Alert Security and all of the people who did not do their job, take responsibility.

It is not just the terrorists here. It is the airline and their security subsidiary who did not do their jobs, and as Mr. Kreindler so pointed out, we would not know that. And as far as the gentleman on the end said and as Mrs. Flynn said, I want my day in court. I want to know what happened because nothing is ever going to bring my husband back. Nothing is ever going to bring back the father of my child. But if those people are made to take responsibility, that is what I care about.

The CHAIRMAN. Mr. Styles, did you want to add something?

Mr. STYLES. If I may, there are a couple of points that I might attempt to clarify. There has been a fair amount of discussion this morning about denouncing the Warsaw system. If the Montreal Protocols 3 and 4 are not ratified, obviously that is an option.

But I think Mr. Shane's testimony should be recalled and specifically what he said. First of all, he said he was speaking personally. And second, he said he thought they would have to consider renunciation of the Warsaw system. He did not say we will renounce the Warsaw system.

Second, it has been said at this table that the United States once before did renounce the Warsaw system. But that is not correct. The United States gave notice of its intention, a 1 year's notice of its intention, to denounce the Warsaw system, in order to try to force other parties to agree to higher limits of liability. When that effort was successful, it withdrew its notice of renunciation.

The other thing I would like to mention is that, although I am not an attorney, I did study some constitutional law in college, and it was my impression that it is not really the responsibility of the judicial branch of the U.S. Government to regulate safety and security. That is the responsibility of the legislature, either on its own or by enacting statutes and entrusting that responsibility to executive departments and agencies.

It is not for me to comment on the details of what happened in the Pan Am 103 or the KAL accidents; those matters are in litigation. But if there is any concern or unhappiness with what happened there or safety features and so on, the place to attack that is through actions by the legislature, the Congress, and the agencies primarily responsible for that, the FAA and NTSB. It is not my understanding that the judiciary was established for regulating that kind of conduct.

Thank you.

Ms. FLYNN. May I comment, please?

The CHAIRMAN. All right. Certainly, Ms. Flynn. And then I think we should be winding up. Ms. Flynn.

Ms. FLYNN. Thank you.

I would like to also address the issue brought up by the former intelligence officer with regard to our intelligence agencies and their investigation of Pan Am 103.

First of all, there are two questions here under investigation.

Pan Am 103, obviously, is involved in a criminal investigation as to the actual terrorists and, hopefully, the state that sponsored the terrorism.

But more so, with Pan Am 103, were the events surrounding the bombing of Pan Am 103, such as the five highest level warning, specific notification and all of the other inequities and unanswered questions.

Therefore, there has to be really two separate investigations.

And may I point out that, only because the families begged and pleaded and fought did we get a second investigation.

We are not concerning ourselves with the criminal investigation. I hope, please God, that our intelligence community will bring that to a closure very quickly. But certainly, the other areas that had to be investigated, were being totally ignored by both the legislative, the executive, and the judicial branch.

And only because of pressure from the families did that come about.

The CHAIRMAN. I thank you very much, indeed.

I would ask unanimous consent to insert in the record a letter from the Association of Trial Lawyers and another covering letter from Senator Biden.

[The letters referred to follow:]

LETTER FROM RUSS M. HERMAN, PRESIDENT, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, TO SENATOR PELL

*November 14, 1989.*

Honorable CLAIBORNE PELL,
*Chairman, Committee on Foreign Relations,*
*U.S. Senate, Washington, DC 20510*

DEAR MR. CHAIRMAN: Thank you for extending us an opportunity to express our views on ratification of the Montreal protocols.

As you know, the Association of Trial Lawyers of America (ATLA) has been a strong opponent of the protocols and we have spoken out forcefully against their ratification in the past. Nothing that has occurred in the 6 years since the Senate rejected the protocols in 1983 has caused us to change our position.

Attached is a copy of a letter we have delivered to Senator Biden for inclusion in the hearing record of November 15. That letter more fully expresses our views.

Again, thank you for your courtesy and for the opportunity to comment. With best wishes,

Sincerely,

RUSS HERMAN.

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LETTER FROM RUSS M. HERMAN TO SENATOR BIDEN

*November 14, 1989.*

Honorable JOSEPH BIDEN,
*221 Senate Russell Office Building,*
*Washington, DC 20510*

DEAR SENATOR BIDEN: The Montreal protocols which limit the liability of international air carriers would unfairly circumscribe the rights of U.S. citizens; as presently constituted, they should not be ratified. Indeed the Senate of the United States itself came to that conclusion in 1983 when it voted to defeat the protocols, rejecting a treaty on the floor of the Senate for the first time in 50 years. That action by the Senate, as well as the opposition to the protocols by the Association of Trial Lawyers of America (ATLA), was fueled by a deeply held belief that artificial limits on the liability of modern-day air carriers, in the manner proposed, was unfair and unsound public policy.

In 1983, Senate consideration of the protocols included discussion of a loosely evolved supplemental compensation plan which would have provided for an insurance program that would have cost each passenger approximately $2 per ticket and would have provided additional benefits of up to $200,000 to compensate for economic losses. Such a plan was not sufficient to overcome ATLA's strong opposition to the protocols themselves. Whether a sufficient plan in fact can ever be developed, implemented, and guaranteed is uncertain. ATLA has concerns about requiring passengers to purchase mandatory insurance and has reservations regarding the wisdom of limiting the liability of a modern industry in cases involving negligence. Certainly the supplemental compensation plan referred to in Secretary Burnley's letter of June 1988 is unacceptable. Still, ATLA is more than willing to keep an open mind regarding the sufficiency of any supplemental plan that may be developed and we will be pleased to advise the committee and the Senate of our views.

In short, at the present time, ATLA believes that nothing that has occurred in the 6 years since 1983 causes us to change our position.

With warm regards,

Sincerely,

RUSS HERMAN.

The CHAIRMAN. And I thank the witnesses very much for being with us.

We have had a good hearing, and I think each viewpoint has had an ample opportunity to present its views.

And we will now adjourn this committee to go over and hear Mr. Walesa.

[Whereupon, at 10:44 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

# APPENDIX

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JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA (BIOGRAPHICAL SKETCH)

James E. Landry joined the Air Transport Association in 1961 as a senior attorney and became director—international programs of the international services department in November 1963. In June 1966, he was elected vice president—international and on April 1, 1970, assumed duties as general counsel of the association. He was named vice president—general counsel in December 1975, and senior vice president and general counsel in December 1978. In this capacity, he supervises the legal, international affairs, and facilitation activities of the association.

Before joining the Air Transport Association, Landry served for 4 years with the Civil Aeronautics Board—1 year as and air transport examiner in the international division, and 3 years as a trial attorney in the routes division. Mr. Landry is a graduate of Union College, Schenectady, NY, and of the George Washington University School of Law and completed graduate studies at the Institute of International Air and Space Law, McGill University.

Landry is a member of the bar of the District of Columbia, and of the D.C. and American Bar Associations. He has served on several ABA committees and currently is a member of the governing board of the ABA's Forum Committee on Air and Space Law.

The Air Transport Association, founded in 1936, is the trade association representing 97 percent of the scheduled air traffic in this country. The association assists its members by promoting aviation safety, advocating industry positions, conducting industrywide programs, and ensuring public understanding and awareness of the air transport industry.

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MICHAEL H. STYLES (BIOGRAPHICAL SKETCH)

Michael Styles is currently regional director for the International Air Transport Association (IATA), covering IATA's interests in the United States. IATA is the trade association of international scheduled airlines throughout the world, with head offices in Montreal and Geneva. Styles is in charge of a small office in Washington.

Styles left the U.S. Department of State in 1979 to become an advisor and consultant in international matters. He joined the Department of State in 1949, and after several different assignments, became Director of the Office of Aviation in 1975. He has BA and MA degrees from the University of Virginia and attended the Yale Graduate School of Economics.

Styles is a past president of the International Aviation Club of Washington. He is married and lives in Fairfax Station, VA.

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LETTER FROM CHARLES F. KRAUSE, COUNSELLOR AT LAW, SPEISER, KRAUSE & MADOLE, SAN ANTONIO, TX, TO SENATOR PELL

*November 10, 1989.*

The Honorable CLAIBORNE PELL,
*Chairman, Senate Foreign Relations Committee,*
*U.S. Senate, Washington, DC 20510*

DEAR CHAIRMAN PELL: It is my understanding that the Foreign Relations Committee has scheduled hearings concerning the recommendation of ratification of the 1975 Montreal Protocols 3 and 4 to the Warsaw Convention, as well as approval of a supplemental compensation plan. I would like this letter to be inserted into the record of the committee's hearing.

I and my law firm have had extensive experience for over 30 years dealing with aviation disaster litigation including literally hundreds of Warsaw Convention. We speak from the experience of dealing with the Warsaw Convention, month in and month out, primarily from the passengers' perspective.

There is no longer any disagreement that the Warsaw Convention with the Montreal agreement, which is now in effect in the United States, is badly in need of reform. The requirement to prove willful misconduct to exceed the limitation of $75,000, which is probably the lowest limit other than in some of the Third World countries, is unfair, expensive, unpredictable, and prejudicial to the rights of the rights of American international passengers.

However, it is also clear that the Montreal Protocols 3 and 4 and the supplemental compensation plan as currently proposed are still not an adequate step forward in eliminating the prejudicial limitations on compensation to the American international traveler. The current porposal permits only economic damages, and only to a limited extent, which would not fairly compensate injured passengers or the survivors of passengers killed in international transportation. We believe that any right thinking person would oppose this restrictive amendment to the Warsaw Convention. The time is now to move to full compensation for the international airline passenger.

It is my understanding that the airlines are now prepared to devise a supplemental compensation plan that would permit both economic damages and noneconomic damages in accordance with the law of the forum in the United States in both death and injury cases. That modification, along with the expansion of article 28 to include the passengers' domicile or residence as a basis for jurisdiction would permit all U.S. citizens and permanent aliens domiciled or residing here, to sue in the United States.

I believe that both the International Air Transport Association and the Air Transport Association of America support the recovery of full compensatory damages, including noneconomic damages, under the supplemental compensation plan, governned by the rules of state law that would be applicable in any action against the carrier. We anxiously await the publication of the revised draft plan.

We appreciate your attention to this travesty that is being imposed daily on the American international passenger. We look forward to working with the committee and the airlines in bringing about a satisfactory change in the current Warsaw scheme.

Sincerely yours,

CHARLES F. KRAUSE,
*Counsellor at Law.*

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LETTER FROM BERT AMMERMAN, PRESIDENT, THE VICTIMS OF PAN AM FLIGHT 103, TO SENATOR PELL

Honorable CLAIBORNE PELL,
*Chairman, Foreign Relations Committee,*
*U.S. Senate, Washington, DC 20510*

DEAR SENATOR PELL: This is to officially inform you that our group, The Victims of Pan Am Flight 103, has modified its position to a neutral one on the proposed supplemental changes to the Warsaw Convention.

However, we do believe that the compensation provided for in the Warsaw Convention of 1929 is woefully inadequate and outdated. It is our hope that your committee will devise an equitable and fair solution to this antiquated provision.

Sincerely,

BERT AMMERMAN,
*President.*

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LETTER FROM JEFFREY N. SHANE, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION, TO SENATOR PELL

*December 28, 1989.*

Honorable CLAIBORNE PELL,
*Chairman, Committee on Foreign Relations,*
*U.S. Senate, Washington, DC 20510*

DEAR MR. CHAIRMAN: During the committee's November 15 hearing on the Warsaw Convention protocols, there was testimony to the effect that investigations currently conducted by attorneys in the course of tort litigation provide an essential

means of discovering the facts concerning an aviation accident. It was suggested that this is particularly the case because of an alleged propensity on the part of Government investigators to conceal any facts that might imply Government malfeasance. The point was that, because ratification of the protocols and adoption of the supplemental compensation plan would obviate such tort litigation, and thereby eliminate the discovery process associated with it, ratification would not be in the public interest. I want to explain why we emphatically disagree with that testimony.

First, it is not true that ratification of the protocols would bring an end to tort litigation in connection with aviation accidents. Under the proposed supplemental compensation plan, after paying claims associated with an accident, the plan contractor would subrogate to the rights of the claimants. Although the airline would not be exposed to further liability, the plan would be able to sue other joint tortfeasors, such as the Government or the manufacturers. The discovery process associated with such litigation might well be even more effective that the discovery process that takes place today which, as Senator Kassebaum pointed out during the hearing, is often truncated by pretrial settlements.

More important, however, is that the aircraft accident investigation procedure employed in the United States and throughout the world has proven to be a far more impartial and effective means of obtaining the facts concerning an aviation accident than private litigation in which the investigating parties have a direct financial stake in the outcome.

Accidents that occur in the United States are investigaged by the technical experts at the FAA and the National Transportation Safety Board. It is important to note that the NTSB is not responsible to either the FAA or the Department of Transportation, and that its independent investigation includes a public hearing, a finding of probable cause, and a public report. In a hijacking or sabotage case, investigations are also conducted by agencies such as the FBI, Scotland Yard, and other agencies responsible for the professional investigation of international criminal acts.

Moreover, the world aviation community, through the International Civil Aviation Organization, has adopted standards which require that the country in which an aviation accident occurs investigate the accident in cooperation with observers from the country of registry of the aircraft and issue a report of findings. The United States is frequently a participant in such investigations, wherever they take place.

We must do everything possible to achieve maximum aviation safety and security. There is no basis for believing, however, that tort litigation is a more effective means of achieving that objective than Government investigations and regulatory enforcement efforts.

I appreciate the opportunity to express our view on this important point. I would be grateful if this letter could be included in the hearing record.

Sincerely,

JEFFREY N. SHANE,
ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS,
*Department of Transportation.*

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LETTER FROM JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA, TO SENATOR PELL

*December 5, 1989.*

The Honorable CLAIBORNE PELL,
*Chairman, Committee on Foreign Relations,*
*U.S. Senate, Washington, DC 20510*

DEAR MR. CHAIRMAN: By a separate submission, dated December 4, 1989, I joined with Mr. Warren Dean, counsel for the International Air Transport Association, in responding to some of the assertions made by those members of the public panel who testified in opposition to ratification of Montreal Protocols 3 and 4 to the Warsaw Convention, at the committee hearing on Wednesday, November 15, 1989. This is to further supplement the record of that hearing with a clarification of some additional matters raised by those witnesses.

First, the opponents of ratification characterized the supplemental plan as a system of mandatory insurance imposed upon international air passengers purchasing tickets in the United States. The implication was that the concept embodied in the compensation system mandated by the executive branch as a condition precedent to ratification was unique and unprecedented. Not so at all!

For many years, Section 401 of the Federal Aviation Act has explicitly provided that no air certificate shall be issued to a U.S. air carrier, or remain in effect, authorizing the carrier to engage in interstate, overseas, or foreign air transportation unless the Civil Aeronautics Board (CAB) or its successor, the Department of Transportation (DOT), has approved its insurance policy or plans for self-insurance in the amount prescribed by regulations or orders issued by that agency. Pursuant to the broad conditioning power given to the CAB (now DOT) in section 402 of that act, the same sine qua non is imposed upon all foreign air carriers wishing to serve the United States. The CAB and DOT have implemented this power through part 205 of their economic regulations (14 CFR Ch. II (1-1-89 edition) at pages 21-25). That regulation states categorically that no U.S. or foreign direct air carrier shall engage in air transportation to, from, or within the United States unless it has in effect aircraft accident liability insurance coverage for a minimum limit of $300,000 for any one passenger, and a total per involved aircraft for each occurrence of $300,000 times 75 percent of the number of passenger seats installed in the aircraft. The costs of the required coverage are, of course, passed on by the airlines to their passengers; they are included in the advertised price of a passenger's ticket.

In the case of Montreal Protocol No. 3, the U.S. Government accepted the fact that it could not expect to introduce U.S. standards as to the value of a human life to the Warsaw Convention and still preserve the enormously important universality of that treaty regime. Consequently, the U.S. Government accepted the highest limitation of liability that it could negotiate with its treaty partners, insisted upon the inclusion in the protocol of a provision for a supplemental compensation plan (article 35A) for the benefit of any nation's citizens, and now has mandated that the U.S. plan cover all compensatory damages, both economic and noneconomic. To accommodate the position of the vast majority of countries, article 35A proscribes the absorption by airlines of any but administrative costs of a supplemental plan. Consequently, the costs of this coverage again will be borne by the passenger; they will be included in the advertised price of the ticket. In short, the advertised price of the ticket will include both the costs of the insurance coverage for the airline up to its initial limit of 100,000 special drawing rights and the costs of the coverage of the supplemental plan, as mandated by the U.S. Government.

The distinctions between the two U.S. Government mandates, one by statute and regulation, the other by treaty and supplemental plan, are in form, not substance. They are indeed distinctions without a difference. They do not represent the heavy hand of an authoritarian government decreeing that airline passengers must purchase insurance; to the contrary, they reflect initiatives of a responsible government determined to guarantee that its citizens will be adequately compensated if they suffer damages in the course of using governmentally licensed common carriers.

We also wish to clarify the record with regard to another assertion by members of the public panel who opposed ratification. Specifically, one or more of those witnesses interpreted an article in the November 9, 1989, edition of the New York Times as stating that Thomas Plaskett, Pan American's chairman and chief executive officer, had complained about the U.S. Government's requirement that Pan Am and other U.S. carriers x-ray checked baggage and interview passengers for security purposes, on international routes. The article correctly noted that foreign carriers do not face similar requirements. While the article may have been ambiguous in this regard, Mr. Plaskett was actually asserting the same point as other U.S.-flag carrier chief executives and ATA's president have been making for some months: the U.S. Government should be protecting all of its citizens who fly internationally; about 50 percent of them fly on foreign-flag carriers; in the 5-year period 1984-88, 9 out of 12 explosions aboard commercial aircraft had occurred on foreign-flag carriers; the U.S. Government should therefore protect all of its citizens flying internationally by imposing the same security requirements upon carriers of all flags for all flights between the United States and the identified high-risk airports abroad.

Last, in the joint ATA/IATA submission of December 4, we cited the minutes of the Tenth Regional Meeting of the American Society of International Law, held on March 24, 1973, at the Syracuse University College of Law, as reprinted in the Syracuse Journal of International Law and Commerce (volume 1, 1972-73). As Mr. Kreindler stated in the hearing, he and I go back a long way together on this subject. As that law journal article reflects, when I then asked Mr. Kreindler whether sufficiency of recovery was his sole remaining objection to the Warsaw-Hague-Guatemala supplemental plan regime, he led into the response quoted in our joint submission, with the following:

> "It is a good question and it can't be answered flippantly or just in one sentence. The tort system as we know it, forgetting for the moment about Warsaw, Montreal, and Guatemala, does, in my judgment confer a number of benefits on

our society. One of the benefits, and I suppose the paramount one, is that by and large it does afford adequate compensation. I think our system does do that to an extent that is unknown throughout the entire world in any other system. . . . There is no system of law any place else in the world, whether it is a compensation system, and administrative system, a tort system absent contingent fee, or a tort system absent juries, that does for those other communities what our tort system does for American people, and in the present context American airline passengers. So that is one benefit accomplished by our system that is extremely important. But is is not the only benefit. . . ."

Mr. Chairman, the Montreal protocol/supplemental plan package before the committee does precisely what Mr. Kreindler said no other system in the world does. It guarantees the *paramount* benefit of adequate compensation—something that the tort system could not provide in a treatyless international environment. It offers what Mr. Kreindler hypothesized: absolute liability and unlimited recovery—a system he conceded he then "would favor," as a "satisfactory tradeoff."

Sincerely,

JAMES E. LANDRY.

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JOINT LETTER FROM JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA; AND WARREN L. DEAN, DYER, ELLIS, JOSEPH & MILLS, COUNSEL, INTERNATIONAL AIR TRANSPORT ASSOCIATION; TO SENATOR PELL

*December 4, 1989.*

The Honorable CLAIBORNE PELL,
*Chairman, Committee on Foreign Relations,*
*U.S. Senate, Washington, DC 20510*

DEAR MR. CHAIRMAN: We represent the airline industry panelists who testified in favor of ratification of the Montreal protocols to the Warsaw Convention at the committee hearing on Wednesday, November 15, 1989. The purpose of this letter is to supplement the record of the hearing as it relates to some of the issues addressed by the entire public panel.

At the outset, it is important to note that the principal purpose of the Warsaw Convention, and for that matter of the tort liability system generally, is to provide compensation for victims of accidents and their survivors. In that regard, no objections were raised at the hearing as to the sufficiency of the compensation to be provided by the Montreal protocols and the revised supplemental compensation plan outlined by the administration and industry witnesses. The overriding concerns of the vast majority of accident victims and survivors—for adequate and timely compensation for the effects of unanticipated tragedy—would be met by these new treaties in a manner not otherwise possible.

The tragedy of families being unable to keep their homes and dependents being unable to attend the college of their choice because of the uncertaintly of timely recovery would not be repeated. It is for these people that compensation systems, including the Montreal protocols to the Warsaw Convention, are designed by governments.

Instead of addressing these issues, the individuals who opposed the treaties at the hearing raised matters extraneous to the overriding concerns of the vast majority of the victims of airline accidents and to the purpose of the treaties. Their arguments relied upon the incorrect premise that ratification of these treaties would eliminate the only reliable inquiry into the causes of airline accidents. Further, they described the tort compensation system of the United States as having characteristics that it lacks in both theory and practice. These matters are addressed in more detail below.

I. *There is no absolute legal right to conduct a factfinding inquiry in civil litigation in the United States.*—A defendant may always admit responsibility for a plaintiff's allegation of damages resulting from ordinary negligence which would end further inquiry by the plaintiff. Of couse, in those cases where the facts and applicable law may support a claim for punitive damages, extensive discovery of the details of the defendant's conduct would be permissible. However, in those cases where the airline's insurer offers a stipulation to accept responsibility for compensatory damages, it is not uncommon for plaintiffs to waive their claim for punitive damages so that the trial, if any, is limited to the question of damages. Since jurisdiction over other potential joint tort feasors in the United States can be obtained by cross claim, the airline's insurers can then obtain contribution to the extent of such party's culpability.

II. *Adoption of an absolute liability regime for international airline tragedies is in no way inconsistent with the important public objective of determining the cause of the accident.*—The need for adequate and timely compensation for the victims of airline disasters should not be confused with the public's right to know the causes of an airline accident. Such a determination should be made by impartial experts, such as the National Transportation Safety Board and the Federal Aviation Administration, who are not influenced by the considerations inherent in the compensation of victims or the legal doctrines that determine that compensation. If there is legitimate doubt as to the adequacy of their inquiries, the remedy is to upgrade the competence and comprehensiveness of those inquiries. It is not necessary to leave that burden with the victim or the victim's heirs.

III. *Ratification of the protocols would not adversely affect the airlines' incentives for safety, financial, or otherwise.*—The loss of consumer goodwill and business that can result from even a perception of unsafe airline practicies can result in the loss of hundreds of millions of dollars of revenue to an airline. This potential loss substantially exceeds any potential additional insurance costs, inconvenience, or business interruption that may result from tort litigation. Two recent studies of the costs of airline disasters, one by the Institute for Civil Justice of the Rand Corp. and the other by the Center for Policy Studies at Clemson University, concluded that airlines' tort exposure and attendant insurance costs play a less significant role in airline safety incentives.

Nevertheless, the protocols do not eliminate entirely liability insurance costs for airlines or their exposure to tort litigation. The protocols and accompanying supplemental compensation plan will simply ensure that passengers receive adequate and timely compensation, no matter what the cause.

IV. *The cost of the supplemental compensation plan does not impose an undue cost on consumers.*—Even though it is reflected in an intercarrier agreement, the establishment of a supplemental compensation system is a right preserved to the U.S. Government under the Montreal protocols. The availability of adequate and timely compensation to all victims of international airline disasters is a legitimate objective of the U.S. Government in this area, as in others. Optional private insurance that is available on a per-flight basis is several times more expensive than the cost of the plan. A popular private policy available today, for example, costs $13 for a policy limit of $400,000.

In fact, the modest cost of the plan—estimated to be approximately $3—must be reflected by the airlines in their advertising of air transportation. All parties will thus have every incentive to keep that cost as reasonable as possible.

V. *U.S. citizens would suffer if there were no uniform liability rules established by treaty.*—Well-recognized legal doctrines interfere with the ability of U.S. citizens to recover damages for foreign torts. The Foreign Sovereign Immunities Act of 1978 provides the exclusive basis for U.S. jurisdiction over state-owned enterprises. The judicial doctrine of *forum non-conveniens* in turn authorizes courts to decline to exercise their jurisdiction over foreign torts. These legal considerations may bar in the United States fault-based recoveries by U.S. citizens for foreign torts. Ratification of the protocols by the United States with a supplemental compensation plan would avoid these pitfalls for passengers in international air transportation under the amended convention.

VI. *Strict liability for international airline tragedies provides significant public benefits.*—The U.S. Government participated in the negotiation and acceptance of revisions to the Warsaw Convention that established strict liability for airlines in international air transportation. The uncertainties of today's international environment, including the continuous threat of terrorist and military violence, impose heavy demands on a compensation system, which are addressed by the protocols.

In this regard, it is notable that Mr. Kreindler, who testified in opposition to the protocols and the new plan before the committee this year, acknowledged years ago in the following published discussion that the precise regime reflected in the revised proposal now before the committee would be beneficial from the public's perspective:

> QUESTION. I wonder if I could ask Mr. Kreindler if his question . . . perhaps indicates that his sole remaining objection to the Warsaw-Hague-Guatemala supplementary plan regime is in the area of sufficiency of recovery?
>
> Mr. KREINDLER. . . . When you ask me if the only thing I am concerned about is sufficiency of recovery, I must answer "No"; that is not the only thing, because I think that the deterrent aspect is important. The movement to absolute liability means that our society loses that aspect of the system. So, where do I come out on the question of sufficiency only? I would say in answer to the question that I asked Mr. Seagrave, that if a system were suggested of absolute li-

ability and unlimited recovery, forgetting my selfish interest as a practicing lawyer who makes his living at it, but trying as best I can to view it from a community standpoint, I would have to favor it. I would favor it because I think that there would be a satisfactory tradeoff. . . . (Syracuse Journal of International Law and Commerce, 354-355 (1973).)

In sum, Mr. Chairna, we agree with Assistant Secretary of State McAllister that the protocols represent the best available option to create a fair airline compensation system in an imperfect international environment. The treaty amendments may not address the personal interests of everyone. Nevertheless, the protocols are far better than the present Warsaw Convention and far better than having not treaty at all, and we believe that Americans should not be deprived of the benefits of the new compensation regime.

We thank you again for holding a hearing on these important amendments to the Warsaw Convention. We understand that Mr. Hans Ephraimson-Abt and Mr. Charles Krause, who respectively appeared and offered written statements in support of the proposed treaty amendments, will also be submitting supplemental statements for the record. We are prepared to work with them and the administration to assist the committee as it undertakes to consider the protocols and the new supplemental compensation plan in the future.

Respectfully,

JAMES E. LANDRY,
*Senior Vice President and General Counsel, Air Transport Association of America*
WARREN L. DEAN,
*Dyer, Ellis. Joseph & Mills, Counsel for the International Air Transport Association*

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LETTER FROM E. TAZEWELL ELLETT, PRESIDENT, INTERNATIONAL FOUNDATION FOR AIRLINE PASSENGERS, TO SENATOR PELL

*November 13, 1989.*

The Honorable CLAIBORNE PELL,
*Chairman, Committee on Foreign Relations,*
*U.S. Senate, Washington, DC 20510*

DEAR MR. CHAIRMAN: Enclosed is the statement of the International Foundation for Airline Passengers (IFAPA) to be included in the record of the Foreign Relations Committee's hearing on the Montreal protocols.

IFAPA appreciates this opportunity to comment on behalf of the worldwide airline passenger community, and would be pleased to submit answers to any followup questions the committee may have.

Very truly yours,

E. TAZEWELL ELLETT,
*President, IFAPA Conseil.*

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LETTER FROM REGIONAL AIRLINE ASSOCIATION, TO SENATOR PELL

*October 20, 1988.*

The Honorable CLAIBORNE PELL,
*Chairman, Committee on Foreign Relations,*
*U.S. Senate, Washington, DC 20510*

DEAR MR. CHAIRMAN: The Regional Airline Association represents the nation's short haul scheduled airlines. About a dozen of our member airlines operate international routes, primarily to Mexico, Canada and the Caribbean. Many other carriers are involved in the carriage of international passengers through code-sharing agreements with major airlines.

We support ratification of the Montreal Protocols, so that the inequities in the present Warsaw system may be corrected. We are encouraged that you have agreed to hold hearings on this matter early next year, in the hope that the excellent work done by the Department of Transportation will bear fruit.

We appreciate your consideration of our views.

Sincerely,

JOHN S. FREDERICKSEN,
*Executire Vice President.*

LETTER FROM DEPARTMENT OF TRANSPORTATION, TO GEORGE BUSH

*June 24, 1988.*

The Honorable GEORGE BUSH,
*President of the Senate,*
*Washington, DC 20510*

DEAR MR. PRESIDENT: This letter requests that the Senate renew active consideration of Montreal Protocols 3 and 4 to the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention). As discussed below, these protocols are currently pending before the Senate.

The Warsaw Convention establishes a uniform liability system for international aviation that has been in effect for over 50 years. However, while the Convention promotes uniformity of law in international transportation of passengers and cargo, it is badly in need of reform, particularly in regard to its outdated $10,000 limitation on recovery for death or injury in international air transportation. The United States has been dissatisfied with this low level of recovery since it became a party to the Convention in 1934.

U.S. discontent with the Warsaw Convention and its low limitation on liability is so strong that in 1965 the United States announced its intention to denounce the Convention, agreeing to remain a party only after carriers serving the United States signed the 1966 intercarrier Montreal Agreement, in which they waived the treaty limitation and agreed to accept liability up to 575,000 per passenger. However, even this higher limitation is inadequate and unfair by modern standards. protracted and costly litigation almost inevitably results wherein victims of air accidents or their families seek to circumvent the limitation so as to recover an amount more in keeping with current standards of reasonable recovery for injury or death. The result is a system that is unpredictable, unfair, costly and confusing to the American traveling public.

The United States has participated actively in the negotiation of the three international agreements which modify and improve the Warsaw Convention, *i.e.*, the 1955 Hague protocol, the 1971 Guatemala protocol, and the 1975 Montreal protocols. None of these agreements contain liability limitations sufficient in themselves to meet the administration's concerns about providing adequate compensation for death or injury in international air transportation. However, for the reasons stated below, the administration believes that Montreal protocols 3 and 4 (the "Montreal protocols"), if combined with an adequate supplemental compensation plan, will provide the traveling public an adequate and fair system of recovery.

Among their other improvements to the Warsaw Convention, the Montreal Protocols increase the possible recovery by passengers against carriers from approximately $10,000 in the unamended Convention to 100,000 Special Drawing Rights (SDR's) (approx. $136,000) in the Convention as amended by the protocols. In 1977, the Ford administration asked the Senate for its advice and consent to ratification of these protocols and proposed that the 100,000 SDR Protocol limit be supplemented by an additional $200,000 recovery per passenger from a separate passenger-funded supplemental compensation plan. However, although this combined recovery of over $300,000 would have been substantially greater than the amount recoverable under the unamended Warsaw Convention (or under the intercarrier Montreal 1 Agreement), it was nonetheless opposed by some Senators as inadequate. On March 8, 1983, despite strong support from the Senate Foreign Relations Committee, the Senate voted in favor of the Protocols by a margin of only 50–42, thereby effectively denying advice and consent to ratification. However, a motion for reconsideration (129 Cong. Rec. 52279) was entered, and the Protocols are still pending before the Senate.

In 1985, I initiated an effort to revise and improve the supplemental compensation plan. During the past several years, the Transportation Department has worked with representatives of U.S. and foreign air carriers, with the insurance industry, and with other U.S. Government agencies, to develop a new draft supplemental compensation plan that should respond to the concerns of those Senators who opposed the plan in 1983.

The new plan would eliminate the major concern of the Senate by creating a private insurance program with *unlimited* recovery per passenger for economic damages, subject only to a per incident, per aircraft, limitation of $500 million. It establishes procedures for the presentation of claims and their evaluation by air carriers and the insurance carrier, and includes a claim settlement inducement provision whereby a court may award costs, including attorneys' fees, if a settlement offer equal to two-thirds of the ultimate recovery under the plan has not been made within specified periods. The plan contemplates a passenger fee of about $5.00, or

less, per round trip international ticket purchased in the United States, to be collected by air carriers and paid to a private insurance carrier. I have attached a current draft of the plan, which will no doubt be developed further during Senate consideration.

Apart from the increase of air carrier liability to 100,000 SDR's, the Montreal Protocols improve the unamended Warsaw Convention in several other important ways. They provide an additional category of jurisdiction for liability suits, based on the permanent residency of the passenger. Thus, U.S. servicemen, diplomats and other employees stationed overseas and traveling in international air transportation not including points in the United States would for the first time be able to pursue adequate recovery for personal injury and death in U.S. courts. Moreover, the Protocols improve the Warsaw Convention's rules relating to baggage ticketing procedures, and cargo documentation particularly in facilitating electronic data processing for passengers and freight, thus removing some existing impediments to maximum utilization of aviation's inherent advantage, speed of transport.

More generally, adherence to the Protocols will enable the United States to remain committed to one of the most widely adhered to treaty systems, and will thereby foster the international uniformity of law which was the original goal of the Warsaw Convention. That the United States has not yet ratified the Protocols has been a matter of considerable concern to our major foreign aviation partners and, for the most part, has kept them from ratifying these protocols.

In view of the many advantages of the Montreal protocols and in view of the improvements in the new supplemental compensation plan-which have been made specifically to satisfy the concerns of the Senate—it is my hope that the Senate will reconsider granting its advice and consent to ratification of the protocols, so that the inequities in the present Warsaw system may be corrected in the near future. We look forward to working with the Senate toward this important revision of U.S. adherence to the Warsaw Convention system.

Sincerely,

JIM BURNLEY,
*Secretary of Transportation.*

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DRAFT SUPPLEMENTAL COMPENSATION PLAN

WHEREAS, by a Protocol done at Montreal on September 25, 1975, (hereinafter referred to as the "Montreal Protocol No. 3") the signatory governments agreed to amend the Convention for the unification of certain rules relating to international carriage by air concluded at Warsaw October 12, 1929, as earlier amended by Protocols done at the Hauge on September 28, 1955, and at Guatelmala City on March 8, 1971 (which Convention, as amended at the Hauge, at Guatemala City and by Montreal Protocol No. 3, is hereinafter referred to as the "Convention"); and

WHEREAS, the Convention sets forth certain conditions and limits of liability of an air carrier in respect of damage suffered as a result of the death or personal injury of a passenger in international carriage by aircraft as therein defined; and

WHEREAS, article 35A of the Convention states: "No provision contained in this Convention shall prevent a state from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

(a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

(b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that state contributions from passengers if required to do so;

(c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carriers whose services they have used;

(d) if a passenger has contributed to the system any person suffering damage as a consequence of death or personal injury of such passengers shall be entitled to the benefits of the system.

NOW, THEREFORE, with the objective of establishing for operation within the territory of the United States of America, a system of supplemental compensation (hereinafter referred to as the "Plan" consistent with article 35A of the Convention and with the intention of complying with the conditions thereof, and further designed to provide full damages for economic loss as compensation to claimants for

...y and all loss sustained in the case of death or personal injury in international carriage by aircraft, the undersigned air carriers and foreign air carriers that are engaged in performing international carriage of persons by aircraft as defined in article 1 of the Convention (such as undersigned air carriers and foreign air carriers being hereinafter referred to as "Carriers") agree with each other and with the undersigned ———————— (hereinafter referred to as the "Contractor(s) as follows:

SECTION 1—THE CARRIERS

1.1 *Filing of Agreements and Tariffs.*—Each carrier shall cause this agreement and any amendment hereto to be filed with or tendered to, as appropriate, the Department of Transportation (hereinafter referred to as "DOT") for prior approval under section 412 of the Federal Aviation Act of 1958, as amended (hereinafter referred to as the "Aviation Act"), and shall include the tariffs filed, posted and published by it pursuant to section 403 of the Aviation Act the "Compensation Plan Contribution" described in section 4.1 of this agreement. The Compensation Plan Contribution shall be included in the advertised price of the transportation, but may be separately stated on the face of the document of carriage or a record thereof.

1.2 *Collection and Payment Over of Compensation Plan Contributions.*—Each carrier shall collection "Compensation Plan Contribution" in accordance with section 4.1 of this agreement. In so doing, each carrier, for the purpose only of collecting the contractor(s) compensation plan contributions under the plan, shall be acting exclusively as agent for the contractor(s) and, accordingly, no carrier shall have any other interest in or entitlement to any moneys collected. Each carrier shall, in the manner and time specified by the contractor(s), identify from all funds received by it in respect to international air transportation the amounts representing moneys collected as compensation plan contributions. Once identified, such moneys shall forthwith either:

(a) be segregated by the carrier from its own funds and held in trust for the contractor(s) as compensation plan contributions to be paid to the contractor(s) in accordance with the plan, or

(b) be paid over to the contractor(s). Within thirty (30) days from the end of each calendar month each carrier shall pay over to the contractor(s) the total of all amounts so collected in that month, as determined by the completed revenue accounting transactions for each month recorded in the appropriate account on the books of the carrier, minus any compensation plan contributions included in refunds made by the carrier in those cases where the transportation was not performed. Interest at the current "prime" rate (which, for the purposes of this agreement, shall mean the average of the "prime" rates charged by First National City Bank, Chase-Manhattan Bank and Chemical Bank, all of New York, New York) as of the date and compounded daily shall be added to all delinquent payments of the compensation plan contributions to the contractor(s) for the period of delinquency; provided, however, that the payment of any such interest shall not excuse any such delinquency. Moneys derived from compensation plan contributions, together with any such added interest, are hereinafter referred to as "plan credits." Otherwise, no carrier shall have any obligation to invest moneys derived from compensation plan contributions for the account of the contractor(s) pending their being paid over to the contractor(s) pursuant to this section.

1.3 *Statistics and Other Data.*

*Note.*—Retain this section for possible statistics and data that may be required by the contractor(s).

1.4 *Retention of Passenger Record.*—Each carrier shall maintain for at least twenty-four (24) months after the date of the commencement of international air transportation by any person covered under the plan (any such person being hereinafter referred to as a "passenger" and being more fully described in section 3.3 hereof) the document of carriage described in article 3, paragraph 1 of the Convention, or a copy thereof; or, if no such document was delivered, then the record for which provision is made in article 3, paragraph 2 of the Convention, or a copy thereof; or any record containing the information required to be preserved by the said article 3 of the Convention.

1.5 *Information and Notice to Contractor(s).*—Each carrier shall notify the contractor(s) and provide any information required by the contractor(s) in each instance known to such carrier;

(a) of the death of one its passengers; or

(b)of the suffering of personal injury by one of its passengers if the aggregate of all actual and expected claims for compensation for damages for such injury of an air carrier's liability specified in article 22 of the Convention.

1.6 *Claim Evaluation Assistance.*—To assist the contractor(s) in its evaluation of claims under the plan, in every case where the aggregate of all claims for compensation for damage sustained in the case of death or personal injury of a passenger is greater than the monetary limit of an air carrier's liability specified in article 22 of the Convention, the carrier shall cooperate with the contractor(s) and furnish, from the carrier's insurer or otherwise, such information as the contractor(s) may reasonably request with regard to such passenger and such claims.

*Note.*—Section 1.5 (information and notice to contractor(s)) and section 1.6 (claim evaluation assistance) in prudential plan to be rewritten to reflect the needs of the parties when a contractor (or contractors) is actually chosen.

1.7 *Withdrawal.*

(a) Any carrier, by written notice to the contractor(s) with a copy to DOT and to each other carrier, may elect to withdraw from this agreement, (1) when it ceases to provide international carriage as defined in the Convention to, from or within the United States, or (2) is otherwise no longer subject to a DOT requirement that it be a party to this agreement.

(b) notwithstanding a carrier's withdrawal from this agreement, its obligations to the contractor(s) hereunder shall continue in respect of any passenger with respect to whom a compensation plan contribution was or should have been collected prior to the effective date of such withdrawal or whose transportation commenced prior to such date.

1.8 *Renegotiation.*—Notwithstanding sections 1.7 and 5.1, the participation of the contractor(s) shall be renewable. It shall be subject to periodic renegotiation subject to the approval of the Department of Transportation following adequate notice.

1.9 *Address.*—Each carrier shall furnish the contractor(s) with the address, including the name of an appropriate person located at such address, to which all notices, demands or other communications required or permitted to be given or sent to the carrier hereunder may be directed in satisfaction of section 6.9 hereof.

SECTION 2—THE CONTRACTOR (S)

2.1 *Receipt of Plan Credits.*—The contractor(s) is the beneficial owner of, and shall be entitled to receive from each carrier, all moneys held as plan credits in accordance with section 1.2 of this agreement.

2.2 *Notice to Claimants.*—Upon receipt of any information or notice from a carrier under section 1.5, the contractor(s) shall give prompt written notice to every claimant or known potential claimant identified in such information or notice from the carrier of his or her possible right to recovery for damages for economic loss against the contractor(s) hereunder.

2.3 *Compliance with Regulation.*—Subject only to its right to terminate this agreement as set forth in section 5.1 hereof, the contractor(s) shall comply with such orders and with such general or special rules, regulations and procedure as DOT may issue or make pursuant to and consistent with the Aviation Act.

SECTION 3—THE PLAN

3.1 *Defination of "Carrier."*—The "Carrier" used in this section 3 shall include any air transportation enterprise that is directly engaged in performing transportation of persons by aircraft, whether or not any such air transportation enterprise is a party to this agreement, or is the actual operator of the aircraft.

3.2 *Purpose.*—The purpose of the plan is to supplement, in a manner consistent with article 35A of the Convention, the compensation payable by a carrier for damages for economic loss in respect of certain deaths and personal injuries arising out of the performance of international air transportation, all as more particularly described in this section 3.

3.3 *Covered Persons.*

(a) Coverage under the plan shall be afforded in respect of any person whose death or personal injury is caused by an event which takes place during international transportation on board an aircraft for hire or in the course of any of the operations of embarking or disembarking unless such death or injury resulted solely from the state of health of the passenger; provided that—

(i) at the time of the event causing such death or personal injury (A) such transportation was subject to the Convention, or, to the extent applicable, the Convention prior to some or all of its component amendments, and (B) such person was a citizen or a permanent resident of the United States; or

(ii) the compensation plan contribution specified in section 4 of this agreement was or should have been collected hereunder with respect to such person for such transportation.

(b) All persons covered under the plan are referred to herein as "passengers."

3.4 *Benfits.*

(a) In the case of a passenger whose transportation was subject to the Convention or, to the extent applicable, the Convention prior to some or all of its component amendments, if a carrier—

(1) has agreed to a settlement of all claims for compensation for damage sustained in the case of death or personal injury of the passenger, in an amount equal to the maximum recovery applicable under the Convention or, to the extent applicable, the Convention prior to some or all of its component amendments, or

(2) has been finally adjudged by a court of competent jurisdiction to be liable for such damages, the contractor(s) shall pay any and all additional damages for economic loss sustained in the case of such death or personal injury for which the carrier would have been liable in the absence of the limits imposed by the Convention.

(b) In the case of a passenger whose transportation was not subject to the Convention plan contribution was or should have been collected.

(1) if claimants have recovered compensation from a carrier sustained in the case of death or personal injury of the passenger to the full extent of the monetary limit of liability applicable under national law, and

(2) if, except for such limit of liability, the claimants would have been able to recover further damages for economic loss from the carrier, the contractor(s) shall pay any and all damages for economic loss sustained in the case of such death or personal injury in excess of the amount for which the carrier is liable.

(c) Notwithstanding section 3.4(a) and (b) the contractor(s) shall not be liable in excess of $500,000,000 per incident per aircraft. If the total amount of provable damages against the contractor(s) should exceed this $500,000,000 limit, all recoveries shall be reduced pro-rata on the basis of the relationship of $500,000,000 to the aggregate of such liabilities of the contractor(s).

3.5 *Limitations.*

(a) No claimant in respect of any passenger under this agreement shall have the right to contest the contractor(s) evaluation of any claim in respect of any other passenger or any payment made in accordance with such evaluation.

(b) Except as provided in section 3.8a of this agreement, the contractor(s) shall not be liable for lawyers' fees and other costs of a legal action incurred by a claimant hereunder.

(c) The contractor(s) shall not be liable for any payment hereunder unless an action therefore could have been sustained against the carrier under article 17, paragraph 1 of the Convention if the transportation had been subject thereto. This limitation shall apply even if the international transportation of a passenger from whom the compensation plan contribution was collected was not subject to the Convention.

(d) The contractor(s) shall not be liable for any payment under this agreement in any case where the right to recover compensation for damages from the carrier has been extinguished by the passage of the applicable period of limitation for the bringing of a legal action.

(e) Subject to section 3.5(g), the capacity of any person other than a covered passenger to make claim under this plan, and the measure of damages for which the contractor(s) is liable to any covered passenger, shall be governed by applicable rules or law in actions in any State of the United States (a) where the ticket as purchased, or (b) if not purchased in the United State, in the State of the passenger's permanent residence, or (c) if neither (a) or (b) is applicable, in the State of ——————.

(f) The liability of the contractor(s) hereunder shall not be affected by the insolvency of the carrier.

(g) The liability of the contractor(s) under this plan shall be limited to compensation of passengers for medical benefits as set forth below in section 3.6, and for economic loss suffered due to an event covered by section 3.3 above. Economic loss means damages for past and future (1) expenses of health or other care; (2) expenses of rehabilitation; (3) loss of earnings; (4) loss of homemaker services; or (5) burial expenses. In any action brought in a court of competent jurisdiction outside the United States, the contractor(s) shall also be liable for other forms of compensatory damages recognized by the forum. In no event shall the contractor(s) be liable for punitive damages.

(h) All sums received by an claimant under the plan, whether paid in settlement or awarded against the contractor(s) by a court of law, shall operate to reduce the

overall recovery by such claimant against any party for death or injury arising out of the subject accident, by an amount equal to the sums paid under the plan.

3.6 *Medical Benefits.*—Whenever the contractor(s) is liable for damages under section 3.4a the contractor(s) shall make payments within a reasonable time after being presented with verified invoices as may be required to effect full reimbursement of all reasonable charges for medical services and supplies incurred by or on behalf of such passenger in the treatment of any personal injury with respect to which a carrier would be liable for damages under article 17 of the Convention, provided however, that charges for the services of the passenger or his or her spouse, or of a child, brother, sister or parent of either the passenger or his or her spouse, other than transportation to and from the accident site or for the purpose of visiting the passenger, shall not be eligible for reimbursement under this section 3.6. Any payment made under this section 3.6 shall be included in the total damages determined to be payable under the plan.

3.7 *Contractor(s)' Obligation.*—A condition precedent to any obligation of the contractor(s) to make any payment hereunder in respect to any passenger shall be that (a) the carrier has agreed to a settlement of all claims for compensation for damage sustained in the case of death or personal injury of such passenger equal to the maximum recovery applicable under the Convention (or, other applicable limit under this plan), and (b) the claimant(s) have executed the settlement documents specified in section 3.10.

3.8 *Claim Evaluation.*

(a) The contractor(s) shall evaluate claims under the plan based upon information obtained pursuant to section 1.6 hereof and upon such other information as it may obtain through independent investigation;

(b) The contractor(s) shall have the right and opportunity to examine the person of any passenger whose injury is the basis of a claim hereunder when and so often as it may reasonably require during the pendency of such claim, and

(c) The claimant shall furnish to the contractor(s) all information, including, but not limited to, financial and medical records or other information, as may be reasonably requested by the contractor(s) to fully evaluate the claim.

3.9 *Settlement Inducement.*

(a) Within thirty (30) days following receipt of a proof of claim in the form and detail specified by the contractor(s), as well as any additional information requested by the contractor(s), the contractor(s) shall make an offer of settlement to the claimant. If no settlement is reached and an award of damages is made by a court of competent jurisdiction, the court may, if it finds that the contractor(s)' initial offer of settlement was not reasonable, award all or part of the costs of the action, including, to the extent appropriate, reasonable attorney fees if such attorney fees are not otherwise included.

(b) Notwithstanding paragraph (a), the court shall not award costs in excess of those normally recoverable under the laws of the forum, if:

(1) The claimant has not made a proof of claim, adequate for a reasonable determination by the contractor(s) of the amount of damages which may be recoverable, within sixty (60) days following settlement by the carrier; or

(2) The contractor(s) cannot reasonably determine the damages because of a failure of a settlement between the carrier and the claimant; or

(3) The contractor(s)' offer of settlement was as least two-thirds (⅔) of the amount of the damages awarded against the contractor(s), exclusive of costs.

(c) No other costs, penalties or sanctions shall be imposed on the contractor(s) in the event that no settlement is reached under this provision.

3.10 *Claim Disposition.*—It shall be an express condition to the rights granted under this agreement that any settlement or satisfaction of a judgment by the contractor(s) shall be in consideration of the execution by the claimant (or by the person legally entitled to receive such payment in his or her behalf) of an appropriate instrument reasonably acceptable to the contractor(s) hereunder the claimant (A) shall release and discharge the contractor(s) from any further liability in full satisfaction of all claims against the contractor(s) by such claimant, (B) shall agree that, insofar as permitted by law, the contractor(s) shall be subrogated, to the extent of such payment, to all the claimant's rights of recovery against any other party except the carrier, its servants or agents, to the degree of such other party's culpability, (C) shall agree that the sums being paid under the plan constitute full and fair recovery for all economic loss, as defined in section 3.5(g), (D) shall release and discharge all potential parties, known and unknown, from any further liability for damages for economic loss, and shall assign or otherwise preserve to the contractor(s) all rights to collect back such damages from third parties, and (E) shall submit a statement to the contractor(s) stating that no more than 20 percent of the

amount (net of court costs) of any such settlement or judgment (including the recovery against the carrier) shall be paid as attorneys' fees. [Language to be drafted to reflect appropriate deference to the laws and practices with regard to attorney fees in foreign jurisdiction.]

3.11 *Effective Date.*—The effective date of the plan shall be the date the Convention comes into force for the United States.

3.12 *Jurisdiction.*—The contractor(s) agrees to submit to the jurisdiction of any court of competent subject matter jurisdiction within the territory of the United States or, in the event the action against the carrier is one arising under the Convention, then to the jurisdiction of any court of competent subject matter jurisdiction where the Convention permits an action against such carrier to be brought.

SECTION 4—COMPENSATION PLAN CONTRIBUTIONS

4.1 *Method of Collection.*—The carriers agreed that a compensation plan contribution [of $————] shall be collected with respect to every person for whom international air transportation originating within the territory of the United States is to be performed on or after the effective date of the plan, provided that such transportation was purchased or, in the case of gratuitous transportation, the authorization was received, within the territory of the United States. The compensation plan contribution will be collected at the time of such purchase or authorization. The compensation plan contribution shall be a part of the advertised ticked price, but may be separately recorded on the face of the document of carriage or a record thereof, which shall be preserved as part of the record for which provision is made in article 3, paragraph 2, of the Convention.

4.2 *Level of Compensation Plan Contribution.*—The compensation plan contribution effective on the effective date of the plan shall, subject to the approval of the Department of Transportation, be revised from time to time, upward or downward, through negotiations of the parties to this agreement following adequate publication to ensure broad participation.

4.3 *Implementing New Compensation Plan Contribution.*—If the new compensation plan contribution determined in accordance with section 4.2 thereof is more or less than the current compensation plan contribution, each carrier forthwith shall include such new compensation plan contribution by it pursuant to section 403 of the Aviation Act and shall specify that the effective date of such new compensation plan contribution is to be not sooner than the forth-fifth day after DOT approval of the new compensation plan contribution under section 412 of the Aviation Act.

SECTION 5—TERMINATION

5.1.

*Note.*—To be completed after discussions with contractor(s).

5.3 *Termination.*—This agreement shall be terminated with respect to a current contractor(s) on the effective date of a contract entered into with a substitute contractor(s).

5.3 *Preemptive Act.*—Procedures to effect the termination of this agreement (as hereinafter more fully described) shall also commence on the effective date:

(a) of disapproval of this agreement by DOT; or

(b) of denunciation of the Convention by the United States; or

(c) of any statute or action of competent governmental authority that precludes the contractor(s) from continuing its operation of the plan.

5.4 *Termination Procedures.*

*Note.*—Procedures to be followed in the event of termination as a result of a preemptive act as set forth in section 5.3 to be written following discussions with contractor(s).

SECTION 6—GENERAL PROVISIONS

6.1 *Agreement.*—This agreement may be signed in any number of counterparts which, collectively, shall constitute one agreement. Each such counterpart shall be deemed an original and it shall not be necessary in making proof of this agreement to produce or account for more than one such counterpart. This agreement shall be open to signature by every direct "air carrier" and every direct "foreign air carrier" as those terms are defined in the Aviation Act.

6.2 *Effective Date of Agreement and Amendments.*—This agreement, and any amendment thereto, including revisions resulting from renegotiations with contractor(s), shall become effective when all of the following conditions have been satisfied:

(a) This agreement shall have been signed and filed with or tendered to DOT, as appropriate, by direct "air carriers" and direct "foreign air carriers":

(i) each holding then-current authority issued pursuant to section 401, 402 or 416 of the Aviation Act; and

(ii) who (including their predecessors, if any) together carried at least 85 percent (or, subject to DOT approval, such lesser percentage as may be acceptable to all parties to this agreement) of all passengers departing the United States by air to foreign countries during the most recent calendar year for which data is available.

For the purpose of determining compliance with section 6.2a(ii), the Secretary of Transportation shall determine such percentage of passengers carried on the basis of available data including DOT statistics and table 11, part 1 of the United States "Immigration and Naturalization Service Reports of Passenger Travel Between the United States and Foreign Countries."

(b) This agreement (or amendments) shall have been approved by DOT in accordance with section 412 of the Aviation Act and antitrust immunity conferred in accordance with section 414 of that act.

(c) The Montreal Protocol No. 3 shall have been ratified by the United States and such protocol shall have come into force in accordance with article VIII thereof, and remains in force for the United States.

6.3 *Petition to the DOT.*—This agreement may be executed in counterparts and shall be filed with the DOT for its approval with antitrust immunity in accordance with sections 412 and 414 of the Aviation Act by the attorney in fact hereinafter designated upon receipt by said attorney in fact of properly executed counterparts of this agreement.

Each party to this agreement holding authority under sections 410, 401 or 416 of the Aviation Act acknowledges that DOT may require every "air carrier" and every "foreign air carrier" (as those terms are defined in the Aviation Act) holding a certificate of public convenience and necessity, an exemption or foreign air carrier permit issued by DOT to become a party to this agreement and hereby agreed (1) to comply with the provisions of this agreement, and (2) to request prior approval by DOT, under section 412 of the Aviation Act of any revisions of this agreement, including negotiated revisions of the compensation plan contribution in accordance with section 1.8 and 4.2 of this agreement.

6.4 *Attorney in Fact.*—Each party to this agreement hereby constitutes the Air Transport Association of America as its Attorney in Fact for the following purposes:

(a) filing with or tendering to DOT, as appropriate, with a request for DOT approval in accordance with sections 412 and 414 of the Aviation Act, its executed counterpart or counterparts of this agreement and any submissions relating thereto;

(b) conducting, jointly with appropriate representatives of the International Air Transport Association, periodic renegotiations with the contractor(s), as required by sections 1.8 and 4.2 of this agreement through a broker or brokers, or otherwise.

(c) advising the Secretary of Transportation by a statement filed in the DOT docket assigned to this agreement, with copies to the parties to this agreement and such other parties as DOT may require, of the results of the renegotiations undertaken in accordance with section 6.4(b) of this agreement, including the new level of the compensation plan contribution if the level is to be changed, and making an appropriate request for DOT approval of the changed level tentatively agreed with the contractor(s) as a result of the renegotiations; provided however, that no changes in the level of the compensation plan contribution will become effective until forty-five (45) days following the effective date of a DOT order approving the change in the level with antitrust immunity;

(d) securing the execution in counterparts by the parties to this agreement of any amendments necessary to change the terms of this agreement or the parties to it.

6.5 *Term of Agreement.*

*Note.*—To be drafted after discussions with contractor(s).

6.6 *Action Against the Carriers.*—The contractor(s) agrees to exercise any right of action against a carrier party to the agreement that is necessary for the contractor(s) to fulfill its obligations under this agreement and that is consistent with article 35A of the Convention.

6.7 *Inspection of Records.*—The records of the carriers that have a bearing on this agreement shall be open to inspection by the contractor(s) at any reasonable time.

6.8 *Governing law.*—The validity of this agreement and its provisions shall be determined under the laws of the [ ] exclusive of the law of conflict of laws of that jurisdiction.

*Note.*—To be completed after discussions with contractor(s).

6.9 *Governing Time.*—Subject to the provisions of the Convention, all dates specified in this agreement shall be determined on the basis of Greenwich Mean Time.

6.10 *Notices.*—All notices, demands or other communications required or permitted to be given or sent hereunder shall be in writing and shall be deemed to be duly given or received if any when hand delivered or sent by registered mail, return receipt requested, postage prepaid, or, in the event of an emergency, by telegraph, as follows:

(a) If the contractor(s) to a carrier, to the address furnished to the contractor(s) by such carrier pursuant to section 1.9 hereof.

(b) If by a carrier to the contractor(s), to: ——— Attention: ———

6.11 *Applicability of Article 35A.*—This agreement is hereby made subject to the provisions of article 35A of the Convention as hereinabove set forth. In the case of any inconsistency, the provisions of the said article 35A shall prevail.

6.12 *No Change in Carrier's Liability.*—Nothing contained in this agreement shall be construed to create any liability on the part of a carrier in respect of the death or personal injury of a passenger.

6.13 *Headings.*—The headings of the sections contained in this agreement are inserted for convenience only and shall not constitute a part hereof.

6.14 *Entire Agreement.*—This agreement contained the entire understanding among the parties hereto in respect of the subject matter contained herein and may be amended only by a duly executed written instrument or instruments.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed by their corporate officers.

## PREPARED STATEMENT OF INTERNATIONAL FOUNDATION FOR AIRLINE PASSENGERS

The International Foundation for Airline Passengers (IFAPA) appreciates very much the opportunity to submit its views on the question of whether the United States should give its approval to Montreal Protocols Nos. 3 and 4 to the Warsaw Convention.

IFAPA is an independent, non-profit organization established under the Swiss Civil Code in 1985 and based in Geneva. IFAPA is the only international passenger-oriented body in the world totally devoted to humanizing air travel. Its mission is to analyze and represent passenger interests with airlines, governments, manufacturers and the travel trade, to ensure that human aspects are considered in reaching government and business air transport decisions and to encourage increased travel and improved understanding among people.

The Montreal Protocols raise important issues affecting international airline passengers and their families. The Protocols would update the 1929 Warsaw Convention, which limited an international airline's liability to $8300 per passenger in the event of an accident. Some nations (though not the United States) signed the Hague Protocol of 1955, which raised this liability ceiling to $16,600. In 1966, a number of U.S. and international airlines agreed to waive the Warsaw limit up to $75,000 on flights to, from or through the United States and to accept absolute liability for death or injury on those flights. This "Montreal Agreement" remains in effect today.

The Montreal Protocols now before the Committee would raise the Warsaw Convention's liability ceiling to 100,000 Special Drawing Rights, which is approximately $130,000. In addition, they would authorize individual nations to adopt a Supplemental Compensation Plan under which air crash victims and their families could recover amounts which exceed that ceiling.

In March 1989 IFAPA undertook a comprehensive study of the Warsaw Convention liability regime from the viewpoint of the

passenger at the request of the Netherlands Minister of Transport. The main findings are attached as Appendix A, and the full report is being submitted for the Committee's consideration. This testimony reflects those findings.

In brief, IFAPA supports efforts by governments and airlines to update the liability conventions governing international aviation and to achieve higher levels of compensation for the victims of aircraft disasters. IFAPA also supports the adoption of Supplemental Compensation Plans to ensure that payments meet prevailing standards in different countries and regions, provided charges to passengers are not significantly increased.

IFAPA's study analyzed the benefits and costs of the new regime and concluded that from the passenger's standpoint, "The Supplemental Compensation Plan concept is beneficial to passengers, and the U.S. plan, as presented to the Senate in 1988, is a broadly positive development for passengers." For U.S. citizens, the benefits include eliminating the current liability ceiling, the settlement inducement provisions, the applicability of the regime on a worldwide basis, and the fact that current problems of inadequate notice will largely disappear.

On the down side, there is the mandatory cost factor, which some have labelled as compulsory insurance and which could be more easily and cheaply obtained by the airlines themselves. Passengers from the low end of the spectrum will be asked to pay a fee for cover they may not need, and it is not clear how passengers will have any say in the process of calculating how high the level will be.

The proposed regime has numerous advantages to the airlines, notably improved passenger protection without additional cost and lower litigation costs, although there is an increased administrative burden of collecting fees. There are broader institutional benefits too, notably the ability to retain the Warsaw system while allowing individual nations to develop their own schemes with limits relevant to national circumstances, which in

this case allows the United States to extend higher protections to its own citizens anywhere they travel.

While the submission of a new Supplemental Compensation Plan proposal is a positive development, that does not mean that approval of the Protocols should be automatic. Differently stated, the United States should not give its approval to these Protocols unless the Senate is satisfied that the proposed Supplemental Compensation Plan will adequately protect the interests of the flying public. No such demonstration was made when these Protocols were presented to the full Senate in 1983, and the Senate duly turned them down.

In seeking Senate approval once again, proponents of the Protocols have modified the Plan in an effort to respond to the concerns expressed in 1983. The major change between then and now is that the airline industry is no longer seeking to limit liability to approximately $300,000 per passenger ($100,000 under the Protocols and $200,000 under a Supplemental Compensation Plan). The question thus arises: Is this change enough? More broadly, the issue is: How does one judge the adequacy of a Supplemental Compensation Plan? From a passenger's standpoint, IFAPA submits that there are several criteria which should guide the Committee in its deliberations.

First, there should be no limitation on a passenger's ability to recover damages beyond that allowed under domestic law. The liability limitations which were built into the Warsaw Convention in 1929 -- only two years after Lindbergh crossed the Atlantic -- were designed to protect an infant industry from serious economic loss in the event of an accident or accidents. Those conditions no longer apply. International aviation has changed dramatically over the past 60 years. The industry is now mature, and indeed, there is much talk today about the evolution of national airlines into a global industry.

Aviation technology and the overall safety record of the industry has also improved dramatically since 1929. As a result, one cannot defend the artificially low Warsaw liability ceilings,

even as amended by the 1966 Montreal Agreement affecting travel to, from and through the United States.

Under the circumstances, there is no reason why airline passengers should be limited to recovering less money if they are killed or injured on an international flight than if they are killed or injured on a domestic flight, and any Supplemental Compensation Plan should be evaluated in that light.

How does that principle apply here? The Supplemental Compensation Plan before the Committee acknowledges the general principle, consistent with U.S. tort law, that there should be no numerical limitation on the amount of money that a passenger can recover in the event of an accident. However, the Plan appears to give with the one hand and take away with the other because it would limit recovery to economic damages, thus excluding recovery for pain and suffering and for any other damages which a passenger may be able to recover in the event of a domestic accident. This shortcoming should be rectified.

A second criterion is that passengers should not pay additional charges unless they will, in fact, be receiving additional coverage in the event of an accident. Differently put, consumers should not be forced to pay extra for something which they are already receiving. IFAPA is troubled by the proposal to fund the U.S. Supplemental Compensation Plan by imposing a surcharge on each international ticket, in an effort to build up the fund out of which victims would be compensated over and above the new ceiling set forth in the Montreal Protocols.

This proposal is flawed for several reasons. To begin with, U.S. airlines and major foreign airlines already insure themselves at levels which would fully compensate every passenger even in the event that a fully loaded Boeing 747 crashed with no survivors, and the Committee heard evidence to this effect at your 1981 hearings on these Protocols.

Next, the available evidence suggests that travelers are obtaining this full coverage for a sum far lower than the $5 figure being bandied about. Testimony presented to this Commit-

tee in 1981 indicated that U.S. airlines paid about 40 cents per passenger per round trip for liability insurance of up to $400 million per occurrence; most of those flights were domestic in nature and thus subject to no liability ceiling.

Thus, the Supplemental Compensation Plan now before the Committee would have the unfortunate effect of charging passengers for a benefit which they are already receiving at a price which exceeds the cost to the airlines. This surcharge would allow airlines to slash their insurance bills, but from a passenger's standpoint, we see no justification for government-approved surcharges which exceed the cost of the benefit being provided.

Moreover, if the Senate should conclude that a surcharge is a necessary element in a Supplemental Compensation Plan which it considers satisfactory, it should require that the rate levels to be paid by passengers be set and revised through a public process, with the amount of any surcharge to be subject to government review and disapproval.

In summary, IFAPA supports the ratification of Montreal Protocols Nos. 3 and 4 so long as an adequate Supplemental Compensation Plan is in place. While the proposed Plan is a step in the right direction, we believe that there are several shortcomings in it which should be corrected before it is deemed adequate.

IFAPA hopes that the Committee finds these comments to be helpful and would be glad to respond to any questions the Committee may have.

## EXECUTIVE SUMMARY AND PRINCIPAL RECOMMENDATIONS

Air travel is one of the great technological achievements and social advances of this century. Through speed, reliability and value for money, it has revolutionised international business, trade and leisure. And it continues to do so. We are moving into an era of global airlines, computerized product distribution, automated passenger processing, satellite communication and ultra long haul wide body aircraft.

All this has occurred at a furious pace in a comparatively short time span.

To place the subject of this study - "Compensation for Aircraft Accidents" - in perspective

amongst these developments, it is necessary to go back 60 years to the dawn of International Aviation.

60 years ago air travel was still in its infancy. In 1929, all the international airlines collectively carried less passengers than one major airline will carry in a month today.

60 years ago air travel was elitist - a very small percentage of the population could afford to fly.

60 years ago flying was considered a risky exercise, and a risky enterprise. Companies and operations were mostly controlled by governments, and heavily subsidised either directly or indirectly through lucrative mail contracts.

It was in this environment exactly 60 years this October, that aviation nations signed the Warsaw Convention dealing with air carrier liability for accidents (and hence compensation to passengers). It was a Convention to protect a fledgling industry during its formative years, to reduce international legal complications for accident victims and to provide a uniform operating regime for governments.

The result was widely hailed as a triumph of foresight and diplomacy - and rightly so. The concepts of uniform procedures, comparatively strict liability and limiting payments to the gold franc equivalent of $10,000 per passenger - a not inconsequential sum in those days), went a long way towards meeting the needs of passengers, airlines and governments.

In the ensuing years a major revision to the Convention at the Hague in 1955, an agreement between the airlines at Montreal in 1966 and further proposals for revision at Guatemala in 1971 and Montreal in 1975 sought to increase the levels of the limit, introduce the idea of strict liability, combined with unbreakability, respond to world currency shifts, and update procedures to maintain uniformity.

Regrettably, the Guatemala and Montreal revisions have not yet become effective due to sharp differences of opinion between states as to the appropriate level of liability limit. The Warsaw regime has therefore formally stagnated for 15 years, although many governments and airlines, individually and in groups, have sought to update the provisions. Courts and regulators have also played their part in some countries in an effort to keep Warsaw's basic features in line with inflation and contemporary social philosophy.

The result is that certain basic aspects of the Warsaw regime are unquestionably out of date and there is widespread recognition of the inadequacies of this situation for airlines and passengers alike.

- Airlines remain dissatisfied that the Montreal Protocols have yet to enter into force - almost 15 years after they were opened for signature.

- Government views are divided. The United States remains reluctant to simply ratify Montreal 3 without an independent supplemental plan to protect its citizens and residents... but it hasn't yet been able to put together and implement a satisfactory plan. Many other industrialised states consider Montreal 3 a vast improvement, but a large number of these are still unwilling to ratify without the US. At the same time, the majority of developing nations believe Montreal 3 moves too far and too fast.

- Manufacturers and other third parties oppose the continuing disparity between their unlimited exposure and the economic protection they see afforded to the airlines.

- Many lawyers and academics argue that limited liability regimes are now unnecessary and some call for a new convention without limits. They note that even the highly prized

uniformity is under question, given that some 80 permutations of the Warsaw system are now estimated to exist.

While there is clearly no consensus on the future direction of the regime, the pressures on the Warsaw system will continue to mount with the passage of time. The moreso with heightened media and passenger attention on safety and security issues.

The prospects for change are hardly reassuring.

At best ratification of Montreal 3, regardless of collateral improvements, would only produce 15 year old liability limits.

At worst a breakdown of the system - which seems increasingly possible - would create legal and procedural chaos.

Either way consumer needs for a fair, simple and predictable compensation safety net are not being met.

At the request of the Netherlands' Minister for Transport, Mrs Smit Kroes, IFAPA has studied this situation from the perspective of the passenger. A perspective which is somewhat different from previous studies - exemplified by the emphasis on "compensation" rather than "liability". The study takes into account the predicted doubling of passengers over the next decade, with rising income levels and increasing awareness of basic consumer rights.

The interests of passengers do not lie in the legal or political complexities, nor the protection of airlines or other parties - all of which are legitimate issues which have dominated consideration of this subject over the years. Passengers are concerned about the down to earth practical matter of having a fair compensation system which operates quickly and predictably in the unlikely event of an accident, regardless of which airline or route they are flying.

At the same time, due consideration has been given to the viewpoint of the airlines, against the background of the sweeping changes enveloping the air transport industry and its markets. The worldwide restructuring in progress - privatization, computerization, liberalization and the internationalization of airlines.

<u>The Study concludes generally that</u>

**The Warsaw system has not adapted to changing needs. It has a number of weaknesses which are detrimental to passengers. Most particularly, the limits, including those in the Montreal Protocols, have become outdated. The concept of supplemental compensation schemes to allow states to increase the limits has not progressed adequately. The Notice of liability limitation is difficult for the average passenger to understand. Moreover, when an accident does occur there can be lengthy delays before settlement.**

Yet at the same time, the airline industry is showing great flexibility in adapting to a rapidly evolving climate.

Governments are making sweeping policy changes to free up markets, tackle congestion and upgrade security.

**FAR LESS RADICAL CHANGES IN THINKING ARE NEEDED TO FAIRLY AND EQUITABLY UPDATE THE WARSAW SYSTEM NOW AND SET IN MOTION MEDIUM TERM RESTRUCTURING TO PRESERVE ITS BENEFITS THROUGH THE COMPUTERIZED, GLOBALIZING AVIATION WORLD OF THE 90s.**

A gradual approach is proposed, aimed at adaptation of the present system rather than its replacement. Realism requires this, and much of the Warsaw system retains its value for travellers. Moreover, passenger concerns, in large measure, could be allayed by imaginative actions within the existing system.

IFAPA recommends:-

**MEASURES MUST BE TAKEN URGENTLY TO REVITALISE THE WARSAW SYSTEM BECAUSE IT HAS MATERIAL BENEFITS FOR AIRLINE PASSENGERS.**

**THE SYSTEM MUST BE UPDATED BY:**

- **RATIFICATION OF THE 1975 MONTREAL PROTOCOLS AS QUICKLY AS POSSIBLE**

- **A COMPLIMENTARY AIRLINE VOLUNTARY MODERNIZATION OFFER TO:**

* **ADD ANOTHER TIER OF COMPENSATION REFLECTING AN AGREED INFLATION FACTOR ON LIMITS SINCE 1975. WE SUGGEST AN ADDITIONAL SDR100,000. SUCH TIER TO BE REVIEWED AND UPDATED EVERY 3 YEARS.**

* **RECTIFY PROCEDURAL SHORTCOMINGS TO IMPROVE SETTLEMENT CONDITIONS; AND**

* **[illegible] OF LIMITATION OF LIABILITY WHICH IS UNDERSTANDABLE TO PASSENGERS.**

**STATES SHOULD ACCELERATE THE INTRODUCTION OF SUPPLEMENTAL PLANS WHERE SOCIO-ECONOMIC TRENDS SO WARRANT, AS THESE WILL IMPROVE CONDITIONS FOR PASSENGERS AND PLAY A KEY ROLE IN ENSURING THE CONTINUING VIABILITY OF THE WARSAW SYSTEM. CARE MUST BE TAKEN TO RETAIN A MEASURE OF COMMONALITY AS NATIONAL AND REGIONAL PLANS EVOLVE.**

**THE EUROPEAN COMMUNITY, WORKING WITH ECAC, SHOULD SPEARHEAD A PAN EUROPEAN SUPPLEMENTAL SCHEME.**

**A GOVERNMENT LED TASK FORCE SHOULD BE CREATED TO PROMOTE WIDESPREAD ADHERENCE TO A REVITALIZED REGIME.**

**THE 27TH ICAO ASSEMBLY SHOULD REACTIVATE THE WORK OF THE LEGAL COMMITTEE ON THE WARSAW SYSTEM AND INCLUDE IN ITS PROGRAMME:-**

* **CONSIDERATION OF A FUND TO COMPENSATE VICTIMS OF UNLAWFUL ATTACKS ON INTERNATIONAL AVIATION.**

* **WAYS TO CONSOLIDATE THE PRESENT TEXTS AND RECTIFY PROCEDURAL SHORTCOMINGS**

* **LONG TERM APPROACHES FOR WARSAW 2000.**

**THE 45TH IATA ANNUAL GENERAL MEETING SHOULD SUPPORT THE INTRODUCTION OF SUPPLEMENTAL COMPENSATION SCHEMES AND PROMOTE THE CONCEPT OF A VOLUNTARY AIRLINE MODERNIZATION OFFER.**

AIRLINES, COMPUTER RESERVATION SYSTEMS AND THE INSURANCE INDUSTRY SHOULD CONSIDER WAYS TO USE SUPERCRS TO PROVIDE GOOD CONSUMER INFORMATION ON THE WARSAW SYSTEM AND EXPLORE THE POSSIBILITY OF SUPPLEMENTARY COMPENSATION COVER.

1929

# Warsaw Convention

FAIR COMPENSATION FOR PASSENGERS IN AIRCRAFT ACCIDENTS

ACTIONS FOR THE 90's

## Hague Protocol

US $ 20.000

1966

## Montreal intercarrier agreement

US $ 75.000

1971

## Guatemala Protocol

US $ 120.000

## Montreal Protocol 3

A STUDY FOR THE NETHERLANDS' MINISTER OF TRANSPORT BY

IFAPA
INTERNATIONAL FOUNDATION OF AIRLINE PASSENGERS ASSOCIATIONS

September 1989

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## BACKGROUND AND SCOPE OF THE STUDY

In March 1989, the Minister of Transport of the Netherlands, Mrs N Smit Kroes, asked the International Foundation of Airline Passengers Associations, IFAPA, to review current and anticipated trends affecting the Warsaw Convention liability regime, from a passenger viewpoint. Aspects of the review were to be undertaken with the Institute of Air and Space Law at the University of Leiden and in close consultation with the Netherlands Directorate General of Civil Aviation.

The Minister specifically sought recommendations for improvement, where needed, in respect of level of compensation, speed of process and adequacy of information. She also asked that particular consideration be given to the role that evolving SuperCRS systems might play in this field in the future.

This study does not go into great historical analysis of the Warsaw regime which is so extensively documented elsewhere. However, those sources have been used to explore the fundamental issues of concern to passengers and to look for possible concepts for improvement. We have been particularly helped by the comprehensive study on the Warsaw System undertaken by Sven Brise for the International Chamber of Commerce in December 1988. During the course of the study, a brief poll was taken to get an indication of industry and passenger opinion on key issues raised in this report.

The study has been guided by a steering committee comprising Roderick van Dam, Netherlands Department of Civil Aviation; Geoffrey Lipman and Philip Chrystal, IFAPA; Pablo Mendez de Leon, University of Leiden.

Over the years as the industry, markets and social conditions have developed, governments and airlines have tried with some success to update the regime in the face of serious difficulties.

The most trenchant problem has been to maintain the concept of uniformity while socio-economic heterogeneity has become increasingly the order of the day. Or to cope with the increasing disparity between industrialized and developing nations. And most particularly how to respond to the boom in living standards, litigation and settlement levels in the world's most dynamic aviation market - the United States. This latter situation, coupled with the fact that most aircraft and engines are manufactured in the US, opening the door for product liability suits, has led to worldwide efforts by accident victims to bring cases in the United States and obtain higher damages.

Then there has been the challenge of the retreat from the gold standard in the 60s playing havoc with a settlement system based on poincarre gold francs, compounded in the 70s by worldwide currency gyrations with the US dollar and pound sterling at the centre.

The massive success of aviation itself has played its part. The emergence of mass transport in the 70s concurrent with a general rise in consumerism in industrialised nations has seen traditional air transport practices come under increasing public scrutiny. A limited liability regime, stagnant for 15 years while governments and industry debate the merits or methodology of change and lawyers litigate through the impasse, is asking for criticism from all sides. The moreso considering that in practical terms there has been no formal change to the system since the Hague Protocol 34 years ago.

Finally there is one facet of the problem which is rarely discussed - the fact that airlines have never been anxious to promote private insurance to any great degree. The rationale being that the underlying reason for buying insurance is concern - however small - for flight safety and this does not promote the development of air transport. Moreover, insurance sale is a relatively time consuming activity with high administrative costs. This means that one obvious market-based way to compensate for the limitations built into the regime has been severely restricted in practice.

Against this background, which tends to invite admiration that the regime has survived so well, we will look at the key features of the Warsaw System from the passengers' perspective.

**Fair Compensation.**

The rationale behind limiting liability was the desire to protect an infant, financially weak industry which would have been unable to sustain massive payouts for damages following a catastrophic accident. There was, not unnaturally, little emphasis on consumer issues at this time.

The concept of limited liability was readily accepted and even seen as indirectly providing benefits to passengers. US Secretary of State, Cordell Hull, in transmitting the Warsaw Convention to the US Senate in 1934 stated:

> "not only...does it afford a more definite basis of recovery tending to lessen litigation, but it will prove to be an aid to the development of international transportation, as such it will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there will be a reduction of operating expenses for the carrier and advantage to travellers in the way of reduced transportation charges".

Moreover, because the Convention was to apply to all types of airline, the single limit had to be a compromise to take account of both the financially stronger and weaker companies.

The limit provided in the 1929 Warsaw Convention of 125,000 Poincarre Francs, while even felt to be somewhat low at that time for many passengers, has to be seen in this general framework of thinking. (1)

Over the years the limit has been increased and there has been a movement away from gold francs to the SDR as a unit of account, as shown in the following table. The Montreal protocols would increase the level to 100,000 SDR.

**FIGURE 1**

**Summary of International Legal Liability Limits**

| Instrument | Gold Francs | SDR | US $ |
|---|---|---|---|
| 1929 Warsaw (123 States) | 125,000 | | 10,000 |
| 1955 Hague (108 States) | 250,000 | | 20,000 |
| 1966 Montreal Carrier Agreement | | | 75,000* |
| ( CAB 18.1900 ) | | | 58,000** |
| Other Special Contracts | | | |
| many airlines | | 100,000 | 125,200**x |
| other airlines | | various limits | |
| Guatemala Protocol (10 States) | ***1,250,000 | | |
| Montreal Protocols (18 States) | *** | 100,000 | 125,200x |

* = including legal fees. ** = without legal fees. *** = not yet in force.
x = market rate as at 29/8/89

The first relevant question to ask is whether the rationale for limits is still valid today.

By any standards the airline industry can no longer be considered as "fledgling". A few figures suffice to prove the point. IATA airlines flew over 1000 billion passenger kilometres in 1988, with over 1 million employees. The same airlines had an operating result of $6.2 billion in 1988 on revenues of some $125 billion - this puts aviation on a par with other major industries. Airlines have nearly 2000 new aircraft on order and are investing billions of dollars in new CRS and Automation systems.

It is the case however that the industry has sustained periods of enormous losses in the recent past and some airlines - particularly those of developing nations - continue to encounter severe financial difficulties.

It is unclear what effect limits really have on airline costs. Insurance premiums today represent about 0.2% of direct operating costs for most airlines. Numerous sources suggest that the existence of limits is a virtually irrelevant factor in determining premium levels, which are dependant on a wide variety of market force factors. It is certainly the case that in the US and Japan insurance costs for unlimited domestic liability exposure have not proven prohibitive. Again the point must be made that for some small developing airlines, which carry a high proportion of upper income passengers, this may not necessarily be the case.

(1) In 1929, gold was valued at $21 per ounce. The dollar equivalent in those days was roughly $5,000.

What is clear is that any increase in insurance costs will pass through to the passenger. We can speculate that small amounts would be easily absorbed, but there is no empirical evidence to judge market reaction. The US scheme under consideration for supplemental cover for example, requires a passenger charge of under $5 per trip: but this assumes mandatory cover and a huge risk spread. It is difficult to envisage great passenger enthusiasm for any development that would significantly increase fares to provide unlimited cover for an event as remote as an aircraft accident. However, if the conclusions reached in the Brise Study on this point prove to be accurate then any fare increases are unlikely to be significant. Moreover, given the general position of States and airlines in favour of retaining limits we do not forsee major change in this respect as being realistic.

The second relevant question is whether the level of limit is adequate today.

As Figure 1 shows, in specific situations the applicable limit can vary considerably - anywhere from US $10,000 to US $125,200 dependant on which airline is being used and what part of the Warsaw system they are operating under.

Analysis of general trends was made difficult by the fact that there is no central source for what regime airlines operate under, particularly with respect to special contracts. The same carrier can operate different conditions for different parts of its route network. It would be helpful if a central source such as IATA or ICAO were to be used for this purpose.

Even without detailed data, some conclusions are readily apparent.

It is evident, for example, that for the vast majority of passengers, the bottom end of the scale is hopelessly outdated in terms of current earning power and living costs. While this situation applies to a very small number of the total air journeys taken over the world network and may thus be small from the general industry standpoint, for the traveller caught in this situation it is a matter of the highest importance. Particularly where, as we shall see later, he is unlikely to know which part of the Warsaw System is applicable to different sectors of his journey.

Equally at the top of the scale, the levels would clearly be sufficient for most passengers from the developing world and for a significant number in the industrialized countries.

To assist in a general assessment of the relevance of the Warsaw system levels, we considered compensation awards in three comparable situations: (1) non aviation transport accidents; (ii) non aviation accidents other than transport; and (iii) aviation accidents where compensation is not limited.

**As for non-aviation transport accidents** - from the research undertaken by the Institute of Air and Space Law at Leiden, which focused on Europe, it emerges that international land and sea transport also are covered by conventions limiting liability - although none have the same scope as Warsaw. Moreover, the levels of compensation provided, while higher than the original Warsaw Convention, are lower than the levels proposed in the Montreal Protocols or the airline special contracts.

In the case of the Athens Convention relating to Sea Transport which has an equivalent of some $60,000 limit, countries such as the US, Australia and the Netherlands refused to ratify because they thought limits were simply too low. Examples exist of voluntary awards outside the Convention, such as those reported in the case of the Herald Of Free Enterprise ferry which capsized off Zeebrucken in Belgium, which on average fall just above $100,000. The International Rail Convention adhered to by some 33 states provides a limit of 70,000 SDR's, equivalent to some $90,000. The International Road Convention, which has so far only obtained 2 ratifications, in contrast has a limit equivalent to $20,000.

It can thus be argued that the Warsaw system compares favourably with other transport modes, as far as the levels of award under conventions are concerned. However it must also be noted that the average airline passenger is in a higher income bracket with higher living standards than passengers using these forms of transport. A 1988 study by the Rand Corporation notes that the average income of air accident victims is twice the national US average. Air transport is the predominant international public transport mode - particularly for the business sector. And air transport should be at the leading edge of progress, setting contemporarily appropriate levels of compensation, in keeping with its passenger service traditions. (2)

**As for non aviation accidents** - the Leiden research showed that in a number of areas where potential large scale awards were envisaged, a different approach has been taken to liability by establishing total limits per event rather than individual limits per victim. This makes comparison more difficult. As does the important fact that air transport passengers elect to use the airlines, whereas victims of environmental accidents, have not agreed to the risk exposure.(3)

Other research papers presented at an IFALPA/ICC Conference in 1988 also revealed an interesting trend in respect of damages in general tort liability cases in OECD countries. Namely that court awards and settlements routinely tend to be far higher than the limits established under the Warsaw system - even at the top end of the scale.

The following tables, drawn from those papers, give an indication of the relativity between "model" non aviation situations and actual air transport limits for seven European states. A standard "model" is used for all countries and the figures have been compiled by insurance experts using actual cases concerning motor vehicle third party liability (case 1), employer's liability (case 2) and medical malpractice (case 3).

What is particularly significant is the similarity in the western European levels for each "case" and the overall disparity between air transport compensation limits and compensation limits in "non aviation accidents". It is also noteworthy that the "non aviation" compensation, based on the 3 case levels rose between 40% and 168% between 1982 and 1988.

**FIGURE 3**

**Increase in Non Aviation "Model" Levels 82-88**

| | |
|---|---|
| France | 40% |
| Germany | 77% |
| Italy | 51% |
| Spain | 168% |
| Switzerland | 42% |
| UK | 45% |

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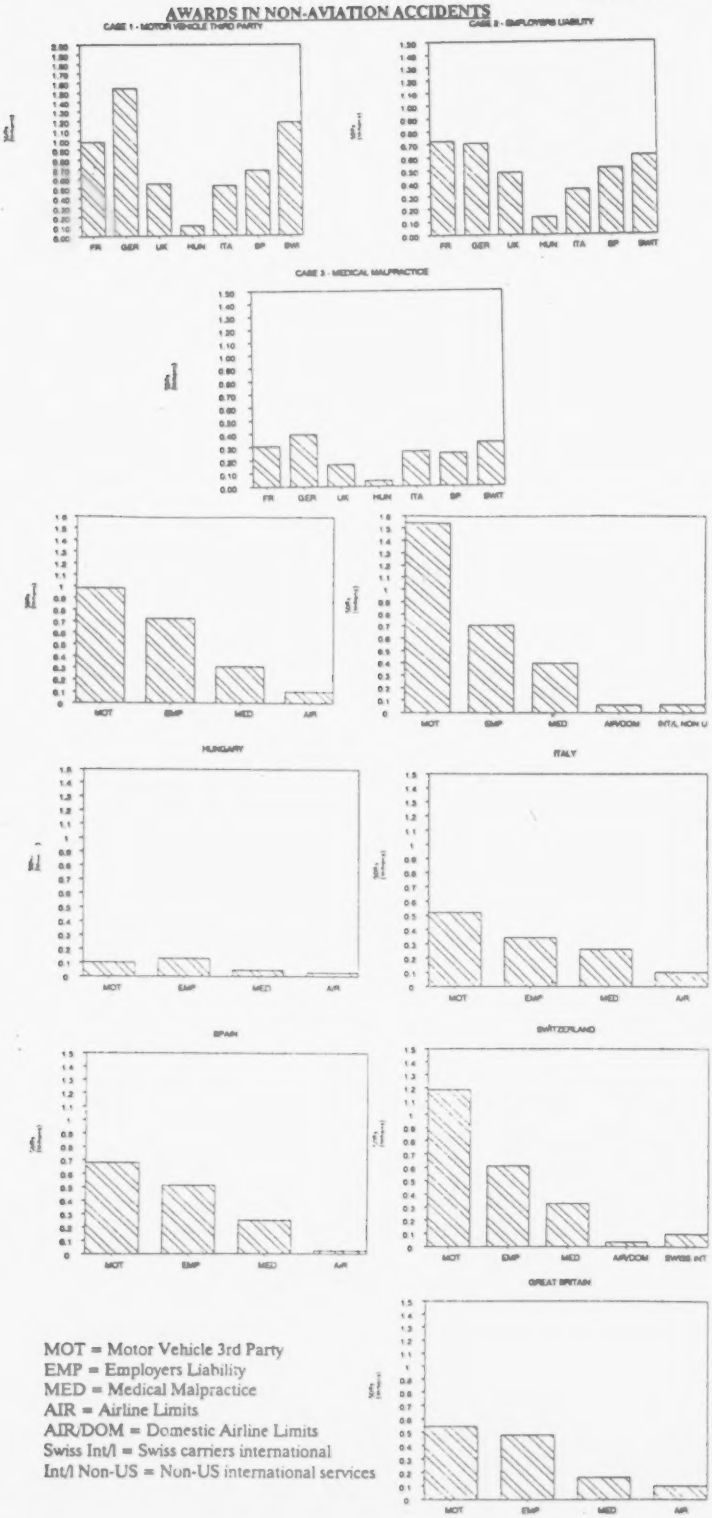
(2) King, Smith, Kakalik et al. Executive Summaries of the Aviation Accident Study. Rand - The Institute for Civil Justice, Santa Monica, 1988.

(3) See, for example, the 1962 Convention on the Liability of Operators of Nuclear Ships (not in force) which provides an unbreakable limit of 1500 million francs (US$130 million) peraccident; the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy where the operator's liability is strict and limited to 15 million European Monetary Agreements Units of Account, the 1969 Convention on Civil Liability for Oil Pollution Damage where tank owners are limited to 210 million francs per incident.

**FIGURE 2**

**AWARDS IN NON-AVIATION ACCIDENTS**




MOT = Motor Vehicle 3rd Party
EMP = Employers Liability
MED = Medical Malpractice
AIR = Airline Limits
AIR/DOM = Domestic Airline Limits
Swiss Int/l = Swiss carriers international
Int/l Non-US = Non-US international services

**As for aviation accidents in unlimited regimes** - the Rand Report provides a detailed analysis on compensation levels awarded by US courts relating to all US airline major aviation death accident cases between 1970 and 1982. The study found that the average compensation level was $363,000. About 25% of the deaths resulted in compensation of less than US$179,000. The maximum compensation awarded was more than $5,000,000 per death. Only 8% of the cases resulted in compensation of more than US$1,000,000, but these cases account for almost 33% of the compensation paid for all deaths combined.

The average compensation level, therefore, was almost double that of the upper limit provided under the Montreal Agreement and considerably more than the average level awarded under either the unamended or amended Warsaw Conventions.

Of particular interest is the fact that average domestic recovery was $475,000 whereas average recovery in Warsaw/Montreal cases where the limits were applied was about $79,000.

The report noted that those holding international tickets and therefore bound by the Warsaw system, were only potentially limited. In fact, 75% of final awards were not limited - usually because third parties were joined as defendants.

It must be emphasised that the Rand Report refers to the compensation levels reached in the US and does not reflect compensation levels in other countries. It does indicate the order of magnitude of the difference with all parts of the Warsaw system. It also gives an indication of where trends in the major industrial states such as Japan, Europe and Australia are heading, albeit at a slower pace.

The experimental poll conducted by IFAPA amongst a small cross section of European airlines, governments, lawyers and consumer organizations asked whether, in the absence of third party defendants,respondents believed that current compensation levels are adequate for the majority of residents in those countries with a medium to high per capita income, i.e. OECD States. It is noteworthy that consumer groups unanimously considered that the limits are too low.

**FIGURE 4**

**RESPONSE TO IFAPA POLL 1989 - "ARE LIMITS ADEQUATE IN OECD STATES?"**

| | Govt. | Lawyers | Consumer Bodies |
|---|---|---|---|
| Yes | 67% | 10% | 0% |
| No | 33 % | 90% | 100% |

Replying on behalf of its members, IATA said that "Warsaw/Hague limits are too low in most cases, but this doesn't take account of special contracts: it is difficult to respond because of different possible interpretations of the question and would need to be considered country by country."

In including this data, we are well conscious of the small sample size, but believe that the indications are at least worthy of note.

As for general conclusions on liability limites from both the Leiden research and review of the air transport situation we believe that:-

> The existence of limits, while no longer necessary to protect "the industry" is in line with transport practise generally. It is probably still important for some smaller airlines.
>
> It is difficult to look at levels in isolation, because they are part of a package which includes trade off benefits to passengers - for example mandating strict liability.

Despite the difficulty, it is evident that, the Warsaw system goes a good way towards meeting the needs of the majority of "low" per capita income level passengers, is questionable in respect of many "middle" per capita income level passengers and probably already fails in respect to high per capita income passengers.

Over the past 15 years, the real value of the limits have eroded against inflation. Moreover they are increasingly falling out of line with awards for non aviation accidents.

**Simple and Speedy Procedures**

In addition to the question of limits, the Warsaw Convention embodies a comprehensive unification of such issues as the definition of international carriage, documentary requirements, jurisdiction for actions and the scope of liability.

The primary objective of unifying various aspects of the contract of carriage was to prevent a conflict of laws and the settlement of jurisdictional issues from the outset.

Given the international nature of the business, the diverse origins of passengers and the different nationalities of airlines, this concept of uniformity has been important to reduce conflicts, streamline process and keep down costs. It has been described as "a precious international gift which has so far has been insufficiently recognised in the current debate on the value of the Warsaw system." And certainly the airlines remain convinced that uniformity is a key feature of the regime which must be preserved.

We believe this view is correct and will become even more important if supplementary plans become a part of the Warsaw regime. At the same time, the importance of uniformity must not be overstated.

Consider for example

- the large number of permutations of the system that now exist . estimated to be in the order of 80,
- the increasing resort to litigation by passengers with the objective of either breaking or circumventing the limits,
- the growing application of supervening national laws and airline special contracts with the result that "diversity and disparity in interpretation and application have become the hallmark of the liability regime."(4)

Article 28 of the Convention, governs the rules concerning jurisdiction where action for damages may be brought. They provide for choice of:

domicile of the airline

principal place of business of the airline

airline's place of business where the contract was made

passenger's destination

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(4) Mercer, A.G. "Modernisation of the Warsaw System - Airline Objectives" Paper delivered before the ICC/IFAPA Symposium "Liability to Passengers in International Air Transport" Paris, 5-6 October 1988, p.4

But this is only the tip of the legal iceberg. For example a passenger can be a citizen of country A, resident in country B, purchase a ticket in country C from an airline incorporated in Country D with principal place of business in Country E for a flight from country F to country G on an aircraft purchased or leased from a company based in country H etc, etc. This farfetched but not totally unrealistic case highlights the potential for conflict. It also underlines the possibilities for forum shopping. One industry observer has noted: "Generally the available jurisdictional alternatives have proven satisfactory but the perennial problem of limits and their inadequacy has encouraged forum shopping expeditions to courts in jurisdictions that are more likely to be receptive to limit-avoiding arguments."

A related issue of particular importance to passengers is the presumption of liability by the airline - known to the lawyers as "reversed burden of proof." This in fact means that the fault of the airline for negligence is presumed providing the accident victim can show damage.

Given the technical nature and therefore the complexity in establishing negligence following an accident, the shift in burden was considered to be of significant benefit to plaintiff passengers. In theory this should stand to speed the process of recovery as the only question that needs to be decided is the amount of damages and the compensation to be awarded.

In practice it may make little difference. The existence of a limit encourages passengers or their lawyers to seek to either break it or to join third parties such as manufacturers as additional defendants.

As the Rand Report concludes

> "where the passenger can only litigate against the airline and the disparity between their real loss and the limit is substantial, it actually increases the level of litigation activity.
>
> Where the passenger is able to successfully join other parties, there is essentially no difference in the litigation procedure."

Nevertheless in the large number of cases around the world which are settled by mutual agreement, reversed burden of proof remains a valuable tool for passengers.

**Clear Information**

Informing passengers of the existence of any limitation of liability is a fundamental obligation on carriers benefiting from the Warsaw system. And the question of whether passengers have been properly informed of limits has been the subject of numerous judgements.

Article 3 of the Warsaw Convention states:-

> "For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> e. a statement that the transportation is subject to the rules relating to liability established by this convention".

The Hague Protocol in an attempt to clarify the notice requirement, is more explicit:

> "In respect of the carriage of passengers a ticket shall be delivered containing:
>
> c. a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and, in most cases, limits the liability of carriers for death or personal injury and in respect of loss or damage to baggage".

The principal means of informing passengers of the existence of limits, according to the text of the unamended and Hague amended Convention, remains via disclosure in the airline ticket - although provision is made in the Guatemala and Montreal Protocols for electronic means.

The US courts, in decisions circumventing the limits have attached great importance to the question of effective Notice - in particular to adequate delivery and the general design of the ticket.

In two cases involving the Flying Tiger Line, the courts emphasised the aspect of personal knowledge of the existence of the limits. It was held that a passenger must be able to read the ticket so as to have a "reasonable opportunity to take measures to protect himself against the limitation of liability" i.e. to take out insurance before boarding the aircraft. (5)

The more controversial decision in Lisi v Alitalia in the US Court of Appeals relates directly to format of the Notice, with the then current design described as:

> "ineffectively positioned, diminutively sized and unemphasised by bold face type, contrasting colour or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."

The court added:

> "The Convention's arbitrary limitations on liability - which have been severely and repeatedly criticised - are advantageous to the carrier. But the quid pro quo for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him reasonable notice that on the trip he is about to take, the amount of recovery to him or his family in the event of a crash is limited very substantially".

Subsequent decisions of the US courts have affirmed the Lisi position.

However, the recent decision of the US Supreme Court in Elisa Chan v. Korean Air Lines could be regarded as something of a shift. The court held that airlines do not lose the benefit of limitation of liability if the Notice is deficient for technical reasons of type size. Furthermore. the decision seems to raise question as to the degree of obligation to provide adequate Notice. **If there is any doubt it is an issue which requires urgent action from a consumer protection viewpoint.**

IATA Resolution 275b which was considered to be a response to the Lisi decision, has determined the parameters, dimensions and type face of the notice: ie. notice should be in bold letter, 8 point size, preferably in Helvetica etc. The Montreal Agreement of 1966 goes further dealing explicitly with size of the type face required for adequate notice.

The so called "IATA Notice" found in all IATA approved ticket stock, remains a constant source of criticism of passengers and their consumer groups.

In the 1989 IFAPA Poll, 55% of passengers questioned replied that after reading the Notice, they did not understand its meaning. As one respondent observed, "I could understand the Notice, if I had read it five times carefully with my lawyer sitting next to me."

An enormous 92% of passengers agreed that information relating to the limits should be explained in "simpler terms using language that is more comprehensible to the average passenger".

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(5) Mertens v Flying Tiger Line Inc 341 F 2d 851 (2nd Circ 1965), 9 Avi Cas 17,475, cert den 382 US 816. Warren v Flying Tiger Line Inc 352 F 2d 494 (9th circ, 1965), 9 Avi Cas 17,848.

## IATA NOTICE

**Advice to international passengers on limitation of liability**

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of the treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of and certain other carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000. The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

**NOTE: The limit of liability of US $75,000 above is inclusive of legal fees and costs except that in the case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.**

Notice

If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

Conditions of contract

1. As used in this contract "ticket" means the passenger ticket and baggage check, of which these conditions and the notices form part, "carriage" is equivalent to "transportation", "carrier" means all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage, "WARSAW CONVENTION" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.
2. Carriage hereunder is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not "international carriage" as defined by that convention. *For carriage wholly within the UK the provisions of the Carriage by Air Act 1961 and Orders made thereunder apply.*
3. To the extent not in conflict with the foregoing carriage and other services performed by each carrier are subject to: (i) provisions contained in this ticket, (ii) applicable tariffs, (iii) carrier's conditions of carriage and related regulations which are made part hereof (and are on file also on application at the offices of carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply.
4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables. carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket. the agreed stopping places are those places set forth in this ticket or as shown in carrier's timetables as scheduled stopping places on the passenger's route. carriage to be performed hereunder by several successive carriers is regarded as a single operation.
5. An air carrier issuing a ticket for carriage over the lines of another air carrier does so only as its agent.
6. Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives.
7. Checked baggage will be delivered to bearer of the baggage check. In case of damage to baggage moving in international transportation, complaint must be made in writing to carrier forthwith after discovery of damage and, at the latest, within 7 days from receipt, in case of delay, complaint must be made within 21 days from date the baggage was delivered. See tariffs on conditions of carriage regarding non-international transportation.
8. This ticket is good for carriage for one year from date of issue, except as otherwise provided in this ticket, in carrier's tariffs, conditions of carriage or related regulations. The are for carriage hereunder is subject to change prior to commencement of carriage. Carrier may refuse transportation if the applicable fare has not been paid.
9. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.
10. Passenger shall comply with Government travel requirements, present and, entry and other required documents and arrive at airport by time fixed by carrier or, if no time is fixed, early enough to complete departure procedures.
11. No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract.

Consumer Organisations were even more critical, 90% believed that the majority of passengers have never read the Notice, 100% replied that they did not believe that passengers understood the Notice. 100% called for a new Notice to be drafted. A selection of comments is contained in Appendix B. We address this point in detail when looking at " Warsaw the Next Moves".

Even those working in the industry agree. Insurance experts said that a new Notice should be drafted as did 90% of lawyers questioned.

The inadequacy of the design is a key factor. Only 43% of passengers surveyed had ever read the Notice and Advice. As one consumer organization added, "it is a well known fact, people do not read small print."

IATA's response to the question of whether a new notice should be drafted is as follows:

"In principle, new Notices should be required only if it can be demonstrated that the existing Notices are inadequate and/or misleading. As a practical matter, however, it is recognised that in all likelihood a new Notice would be required as a consequence of the entry into force of Montreal Protocol 3."

In other words, yes, maybe - but don't affect the drive for ratification.

We do not agree.

The requirement for decent comprehensible information has been there from the time the

Convention was signed. It is more necessary now that the regime has become more complicated with various amendments over the years and as consumer protection norms have crystallised.

We have no quarrel with the industry's desire to protect itself in a legally sound manner from lawsuits - the present so called Notice obviously has that objective. But it fails to inform passengers simply and straightforwardly that their rights have been limited: advise them clearly how to find out about it if they're interested and inform them what they can do to alleviate the problem.

As the US Court said in the case of Ross v PAA "The airlines have been given the utmost consideration as against the passengers they are paid to transport. At least they should be held sharply to the doing of the few acts which are required by the Warsaw Convention in return for the consideration granted them".

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CONCLUSIONS AND RECOMMENDATIONS ABOUT WARSAW TODAY

**WHEN THE WARSAW CONVENTION ENTERED INTO FORCE, ONLY A SMALL PERCENTAGE OF TRAVELLERS FLEW AND WERE AFFECTED BY THE LIMITS. IT WAS NOT A MAJOR ISSUE OF PUBLIC POLICY. HOWEVER, TODAY A MUCH LARGER PERCENTAGE TRAVEL BY AIR AND ARE AFFECTED. AN EQUITABLE REGIME IS AN INCREASINGLY IMPORTANT PUBLIC POLICY ISSUE.**

**THE AIRLINE INDUSTRY IS COLLECTIVELY STRONG AND ROBUST AND DOES NOT NEED THE SAME KIND OF LIABILITY PROTECTION WHICH WAS ESSENTIAL IN ITS INFANCY. THERE ARE HOWEVER CERTAIN AIRLINES, WHO MAY STILL REQUIRE SPECIAL CONSIDERATION TO HELP THEIR DEVELOPMENT.**

**THE WARSAW SYSTEM HAS PROVEN ADVANTAGES FOR PASSENGERS WHICH SHOULD BE PRESERVED. THESE ARE MOST EVIDENT IN RESPECT TO THE VARIOUS ASPECTS OF PROCEDURAL UNIFORMITY.**

**THERE ARE ALSO EVIDENT SHORTCOMINGS, MOST SPECIFICALLY WITH RESPECT TO INADEQUATE LEVELS OF LIMIT IN INDUSTRIALIZED STATES AND POOR NOTICE TO PASSENGERS ABOUT LIABILITY LIMITATION.**

**THE LEVEL OF LIMITS, WHILE COMPARABLE WITH OTHER TRANSPORT CONVENTIONS IS LOW AGAINST AWARDS IN NON AVIATION ACCIDENTS IN CERTAIN PARTS OF THE WORLD - NOTABLY EUROPE - AND IN RELATION TO UNLIMITED LIABILITY AVIATION REGIMES. BUT THIS IS SOMEWHAT AMELIORATED BY THE PACKAGE OF PROCEDURAL BENEFITS CONTAINED IN THE WARSAW SYSTEM.**

RECOMMENDATIONS

**THE WARSAW REGIME SHOULD BE MODERNIZED:-**

**LIMITS SHOULD BE INCREASED IN LINE WITH COMPARABLE AWARDS OUTSIDE AVIATION,**

**PROCEDURES SHOULD BE FURTHER IMPROVED TO BOLSTER UNIFORMITY, AVOID CONFLICTS AND MINIMISE COST**

**A NEW CLEAR CONCISE NOTICE SHOULD BE DEVELOPED AND PROMINENTLY DISPLAYED.**

**PART B**

## WARSAW - THE NEXT MOVES

Given the widespread support amongst Governments and airlines for the Warsaw system why have the updates agreed some 15 years ago in the Montreal Protocols only been ratified by a handful of States;

More pertinently one should ask what this means for passengers.

The impasse itself stems partly from the inability of the United States to implement an acceptable Supplemental Plan to increase liability levels, so as to Ratify the Protocols and the unwillingness of other States to ratify without US action. A number of Governments have problems with procedural changes proposed, while many from the developing world are unwilling to accept the increase in limits. Behind the states are the airlines, lined up through IATA, originally advocating US action as a precondition for more general ratification, laterly pressing for the reverse. And there are the other unprotected parties in the liability chain - manufacturers, airports and the like who want to see their own protection increased.

### The Montreal Protocols

In response to IFAPA's spot poll, nine out of ten European governments supported the immediate entry into force of the Montreal Protocols, the other favoured longer term adoption. The airlines in the coordinated IATA response said that ratification is essential before any further changes can be envisaged.

**Yet, as we shall demonstrate, from the passengers' perspectives there would still be serious deficiencies if the protocols simply come into force as presently conceived.**

### Fair Compensation

Montreal Protocol 3 raises the limits to 100000 SDR (approximately $125,000), adopts the concept of unbreakability of limits and an escalation mechanism initially proposed in the Guatemala City Protocol.

The introduction of the SDR, now widely used as a unit of account is clearly a beneficial step, it limits the impact of currency fluctuations, moves the regime away from the antiquated gold franc base and preserves the value of compensation in real world terms.

The new limit is a dramatic increase on the $10000 levels of the original Warsaw Convention and almost twice the level of the 1966 Montreal intercarrier agreement.

As such it may well be adequate for the majority of passengers from low and even medium income level states.

But it still remains far less than the levels of compensation to victims in non aviation accidents in industrialized countries. It is well below awards in those domestic jurisdictions where liability is unlimited.

**Most obviously it is now 15 years old. Inflation in OECD countries has increased dramatically in the intervening period. Incomes and living costs have risen similarly. If the level was considered equitable for the majority of passengers in 1975 (except where Supplemental Plans were seen as imminent) it is clearly not the case today.**

The problem is what to do about it. The Guatemala Protocol makes provision for possible escalation in two stages during the 5th and 10th years after entry into force of the Protocol. Neither increase is to exceed 12,500 SDR and there is no guarantee that any increase will be

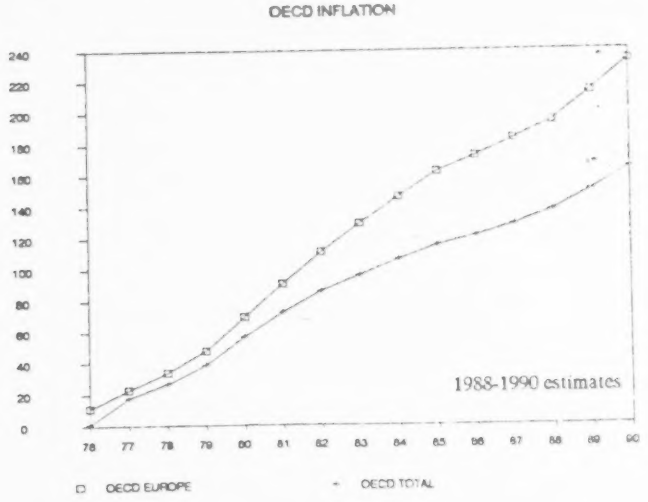
applied. Clearly that is derisory in relation to 15 years inflation even if it were applicable today. And there is a technical problem - the escalation provision is tied to the dates the Guatemala Protocol comes into force and the reality is that this protocol has been surpassed by Montreal. If the provision is triggered by ratification of Montreal 3, the best possible increase would be to 112,000 SDR in 1995 and 125,000 SDR in 2000.

A separate but related issue raised by the Montreal Protocol terms is the introduction of the concept of "unbreakable limits". In other words, even in cases of say wilful misconduct or criminal negligence by an airline its liability remains limited. This is clearly a provision of value to airlines, which curtails further the rights of passengers. As such one would imagine that the Protocol makes significant concessions to passengers in other areas. Evidently at the time the Guatemala and Montreal Protocols were being developed, the increase in levels was seen as the compensatory passenger benefit. The passage of time has reduced the value of the increase in limit due to inflation; in contrast, it has augmented the value of the unbreakability provision because of the increase in living standards and earning power of accident victims.

**WE BELIEVE THAT THIS DEFICIENCY IN LEVEL OF THE LIMIT MUST BE TAKEN INTO ACCOUNT IF RATIFICATION OF THE MONTREAL PROTOCOLS IS REALLY TO BE A FAIR DEAL FOR PASSENGERS TODAY - THE MORESO TOMORROW.**

**As Figure 6 clearly demonstrates, from the signing of Montreal 3, inflation in OECD countries will have increased some 150% and for OECD Europe by some 230% by 1990.**

FIGURE 6




Source: OECD - Historical Statistics - Economic Outlook 1975-1988

**WE THEREFORE CONSIDER THAT THE LIMITS AS ESTABLISHED AT MONTREAL IN 1975 NEED TO BE INCREASED BY AT LEAST 100% TO 200,000 SDR TO RETAIN ANY SEMBLANCE OF VALIDITY IN THE EARLY 90s. THE REALITY IS THAT AN INCREASE OF MORE THAN 150% IS JUSTIFIED BY THE STATISTICS.**

**Simple and Speedy Procedures**

Montreal Protocol 3 inter alia, codifies the concept of strict liability and extends jurisdiction to include domicile or permanent residence.

There is no doubt that these provisions are of value to passengers.

By eliminating the possibility for airlines to argue that the damage was not its fault or its agents, the litigation process will be shortened or eliminated and settlement speeded up. This codifies the terms of the 1966 Montreal intercarrier.agreement and certain airline special contracts.

Extension of jurisdiction is particularly useful. It reduces the need for passengers to bring suit in unfamiliar or distant countries and therefor reduces costs. But most importantly it brings the Warsaw system in line with reality. It is the court in the country where an accident victim lives that is most likely to respond to the relevant socio economic conditions. Airlines from developing states have not favoured this provision, arguing that "the peasant will have to pay for the soup of kings".

Sven Brise in his study suggests that insurance premiums will increase only marginally if Montreal 3 is adopted - estimating such annual payment in the order of $14 million only, for the world's airlines. This compares to 1989 operating expenses of more than $60 billion for international scheduled services. Even though the bulk of the increase would be on developing airlines, this remains a very small percentage of operating costs even for those carriers - assuming the estimate is in the right ballpark. Furthermore Brise makes an interesting case that airlines from developing states will actually benefit from ratification of the Protocols. The reason being that the US Supplemental Plan will encompass a significant percentage of high income level passengers even when travelling on non US developing state airlines. As a consequence, potential risk exposure of those airlines will be reduced in the event of an accident and consequently insurance premiums should also reduce.

What the Protocols do not do, is to make any change with respect to upfront payments or settlement inducement procedures. The accident victim or estate must still await the result of what may be a lengthy litigation or claims process. This situation is particularly hard on victims who do not have ready access to funds.

**WHAT IS NEEDED ARE RELATIVELY SIMPLE PROCEDURES -**

- **PROVISION OF AN IMMEDIATE BASIC AWARD OF SAY SDR 20,000 PER PASSENGER, TO BE OFFSET AGAINST FINAL SETTLEMENT.**

- **PROVISION FOR A REASONABLE SETTLEMENT PROPOSAL TO BE FORTHCOMING WITHIN SAY 60 DAYS OF ADEQUATE PROOF OF DAMAGE.**

The details of such provisions will need to be fleshed out, but that can be readily handled within the concepts of supplemental plans and voluntary agreements identified below. The US plan for example calls for payment of 2/3 of final recovery amount within 60 days of proof of damage.

**Clear Information**

Following the initiative of the Guatemala City Protocol, Montreal 3 provides for the possibility of airlines using electronic ticketing.

However, it has been argued that the terms of this provision are so vague as to allow carriers to omit notice with impunity. We consider the prospect of deliberate omission as unlikely given the potential risk exposure a carrier might incur. Electronic ticketing machines can readily provide notice and hard copy can be on the ticket card or the jacket. To the extent that there is any doubt as to notice requirement, the matter could be rectified by an industry standard for a simple liability limitation notice as part of electronic ticketing parameters. In the longer term any electronic notice deficiency must be fixed in the instruments of the Warsaw system. As this will become the dominant way of ticketing in the future it is an issue which will increase in importance over time.

The main point however, is that there is no change in the Protocol which makes it more likely that a passenger will receive adequate notice of the existence of limits.

**WHAT IS NEEDED IS A BASIC CONSUMER INFORMATION DEVICE NOT AN AIRLINE PROTECTION DEVICE AS THE CURRENT NOTICE HAS BECOME. IT MUST BE DISTINCTIVE, IN PLAIN SIMPLE NON LEGALISTIC LANGUAGE. IN ENGLISH AND THE LANGUAGE OF NATIONALITY OF THE AIRLINE. IT MUST TELL THE PASSENGER THAT HIS RIGHTS ARE LIMITED AND ADVISE WHAT CAN BE DONE TO GET MORE INFORMATION EASILY AND TO SUPPLEMENT LIMITS IF DESIRED.**

We suggest a separate page of the ticket which says something like:-

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IMPORTANT INFORMATION. PLEASE READ CAREFULLY.

**In the unlikely event of an accident, the airline will pay compensation for death, personal injury or damage to baggage. The amount of compensation will be related to actual damage incurred BUT THERE IS AN UPPER LIMIT SET BY INTERNATIONAL TREATY AND NATIONAL LAWS.**

**Compensation limits may be different for domestic and international journeys.**

**To find out about your rights, carefully read the notice and advice on liability limitation contained in this ticket. If you don't understand please ask our reservations staff or your travel agent for advice.**

**If you wish to supplement this compensation, you may want to consider purchase of additional travel insurance.**

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Nothing in this new Notice is intended to replace the standard texts that airlines currently use to protect themselves from lawsuits based on inadequate Notice. It is simply a straightforward approach to consumer advice that we believe will actually mean something to passengers. It should be noted that in response to the IFAPA Questionnaire one European State expressed concern at the adequacy of Notice following the entry into force of the Montreal 3 Protocol and the consequent unbreakability of limits.

**THESE DEFICIENCIES OF PROCESS AND NOTICE SHOULD ALSO BE ADDRESSED IN THE CONTEXT OF RATIFICATION OF THE PROTOCOLS.**

**Supplemental Plans**

The concept of Supplemental Plans first appears formally in Article 35A of the 1971 Guatemala City Protocol and is picked up in Montreal 3. States are expressly allowed to establish and operate in their territory "a system to supplement the Compensation payable under the Convention". Such schemes are subject to the conditions that there is:-

- no extra liability on airlines.
- no extra financial or administrative burden on airlines except collecting contributions from passengers if required;
- no discrimination between airlines and benefits available regardless of which carrier a passenger uses.
- recompense for any person suffering damage if the passenger has made a contribution to the system.

The package of conditions responds to the interests of passengers for broad cover and particularly of airlines for no additional burdens beyond the main Convention requirements other than collecting premiums.

It was envisaged that such plans would allow States wanting to provide additional compensation to do so through mandatory insurance based schemes, without forcing others to follow.

To date only the United States has formally sought to introduce such a scheme, although Japan and Sweden are known to have the concept under very close review. 5 out of 10 European Governments responding to the IFAPA poll said they favoured introduction of supplemental plans in the medium term: although the major aviation states were silent on the point.

The history of US efforts to introduce a Supplemental Plan is well documented elsewhere. In summary, in 1977 a scheme was proposed to ratify Montreal and add $200,000 additional cover, funded by passengers contributions - anticipated at $2 -$4 per ticket. It was finally rejected by the Senate in 1983 after effective lobbying by trial lawyers and unprotected but potentially liable groups. A revised proposal was re-introduced by the Reagan Administration in June 1988.

The 1988 Plan, is currently being modified to take account of the views of directly affected parties, but its main features are:-

- Unlimited recovery per passenger, subject only to a limitation of $500 million per aircraft.
- Economic loss only covered. (the key issue under review) Plus all reasonable medical expenses.
- A fee of less than $5 per round trip international flight, collected by airlines, shown on the ticket and paid to an insurance organization. The exact level of the fee to be determined through negotiation between "all interested parties."
- Applies to all tickets purchased in the US for international travel, plus US citizens or residents travelling anywhere under the Warsaw system.
- Limits lawyers fees to 20% of damage and includes a settlement inducement clause whereby a court can require reimbursement of all legal fees if no reasonable settlement offer is made within 60 days of a claim.
- Establishes procedures for claims against parties other than airlines.
- Embraces all airlines offering international service to and from the US.

The scheme provides a wide range of benefits to passengers, most particularly the removal of any limits on damages and the settlement inducement provisions. For US citizens or residents it offers, the worldwide applicability and with it use of US socioeconomic standards. Problems associated with inadequate notice will largely disappear with the unlimited liability.

On the downside, there is the mandatory cost factor - which some critics have labelled compulsory state insurance, arguing that the cover could be more easily and cheaply picked up by the airlines themselves. Passengers from the low end of the income spectrum will be asked to pay a fee for additional cover they simply may not need. It is not clear how passengers who will have to pay the fee, will have an adequate say in the establishment of the level.

For airlines there are a number of advantages, most particularly the improvement in passenger protection is achieved without additional cost - as it is paid directly by the passenger. Moreover, litigation and legal fees would be contained. The quid pro quo is the increased administrative burden of fee collection, although there are many precedents already in existence for routine collection of charges and taxes.

It is only the other parties in the liability chain who seem to have little to gain from the scheme and this has been one of the key reasons for continuing negotiations on the precise shape of the plan, prior to Senate hearings.

There are broader institutional benefits - the ability to retain the Warsaw system while allowing states to develop there own schemes with limits relevant to national circumstances is a major gain. The fact that the plan extends to citizens and residents anywhere under the Warsaw system has the decided advantage of returning high claims to the US, which should have appeal to developing states.

At the present time, there are signs of progress on the US plan. In late August 1989 Secretary of Transportation Skinner has asked for Senate hearings and urged ratification of the Montreal Protocols.

In reflecting on the scope for Supplemental plans generally, it is evident that the concept has great potential for the kind of flexibility needed if the Warsaw system is to be preserved.

For example some of the current procedural deficiencies such as inadequate notice and lack of upfront payment can be easily incorporated. Limit levels can be developed to suit national or regional circumstances.

Moreover it is possible that supplemental plans can address some of the concerns expressed - reasonably in our view - by the other parties in the liability chain who until now have watched the airlines benefit from limitations which by their very existence make those parties the focal point for litigation. We are not addressing the issue of co-liability in any depth in this report as it represents a loophole in the Warsaw System rather than a specific feature. Suffice it to say that the revised US supplemental plan has benefited from an active involvement of organizations representing airports, airframe and engine manufacturers and the like. It deals specifically with the question of "right over" against other parties to the degree of their culpability for damage. This may ultimately provide a lead in dealing with this matter which is not yet handled effectively within the scope of the Warsaw system.

Flexibility can of course be a mixed blessing and care will have to be taken not to lose the overall uniformity of process as more plans evolve - as they surely must, with increases in inflation and living standards.

Model elements of such plans should be considered to prevent too great a fragmentation of the Warsaw system. These could include:-

- Notice and documentation standards.
- Modernization of procedural shortcomings
- Periodic limit review mechanism.
- Jurisdiction options
- Subrogation procedures

This is a role that the Legal Committee of ICAO would be ideally placed to assume once it recommences its work in the liability field.

**WE BELIEVE THAT ON BALANCE THE SUPPLEMENTAL PLAN CONCEPT IS BENEFICIAL FOR PASSENGERS, THAT THE US PLAN AS PRESENTED TO THE SENATE IN 1988 IS A BROADLY POSITIVE DEVELOPMENT FOR PASSENGERS AND THAT OTHER STATES - NOTABLY FROM THE OECD - SHOULD ACCELERATE THE INTRODUCTION OF SUCH SCHEMES.**

In the latter context, the question arises as to when a particular state or group of states might consider supplemental plans necessary. A variety of social, political and economic factors come

into play, but from the passenger viewpoint, logical trigger points would be when awards or settlements in non aviation accidents routinely surpass the Montreal 3 levels.

**STATES SHOULD CLOSELY MONITOR ACCIDENT SETTLEMENT TRENDS GENERALLY AND ACT TO INTRODUCE SUPPLEMENTAL PLANS WHEN MONTREAL 3 LIMIT LEVELS FALL OUT OF LINE.**

early 80s, the Malta Group, an informal but highly influential gathering of government aviation lawyers has had the question on its agenda - although no concrete proposals have emerged. The Nordic countries, with a common socio political background, similar economic conditions and developed consumer consciousness are known to be exploring possible approaches. The EC Commission has recently undertaken a study of air transport passenger liability and is committed to action on product liability generally. ECAC - The European Civil Aviation Conference - could also play a constructive role, not only because it brings together almost twice as many European states as the EC, but because of its longstanding expertise in the air transport field, its links with ICAO, the "guardian of the Warsaw system" and the monitoring role it has assumed in this field in recent years.

**WE BELIEVE THE TIME IS OPPORTUNE FOR THE EC TO TAKE A LEAD IN SPEARHEADING CONSIDERATION OF A SUPPLEMENTAL PLAN. IT'S IN LINE WITH THE 1992 DRIVE TOWARDS A SINGLE MARKET. THE ISSUE FALLS SQUARELY WITHIN ITS SOCIAL HARMONIZATION, AIR TRANSPORT AND CONSUMER PROTECTION AREAS. MOREOVER THE PREVAILING ECONOMIC CONDITIONS ARE SUFFICIENTLY HOMOGENOUS TO MAKE SUCH A SCHEME WORK. AND IT HAS THE LEGAL FRAMEWORK TO BACK IT UP. EFFECTIVE COORDINATION WITH ECAC WOULD PROVIDE A LONGER TERM BASIS FOR A GENUINE PAN EUROPEAN INITIATIVE.**

It would be naive to consider supplemental plans as an off the shelf panacea. Apart from the questions of conflicting interests and attitudes of the involved parties, there are real problems of the administrative complexity and the sheer scale of change needed to implement such a scheme. The US plan has taken ten years to get to the stage where it is seen as having a possible chance of success. A European plan has the added complication of national interests to take into account, although it would have the benefit of the US experience.

The bottom line however, is that even if the Montreal Protocols were to be quickly ratified, any further formal change to the Warsaw system would take many years to achieve. Supplemental Plans thus become a key way for the system to evolve and thereby maintain real world relevance.

<u>Voluntary Agreement</u>

The Warsaw Convention itself has a provision that "by special contract, the carrier and the passenger may agree to a higher limit of liability." This device has been used over the years to raise limits in situations where they have fallen out of step with market reality.

For the most part the impetus has come from government, where domestic legislation has pushed limits beyond their international counterparts.

The most significant special contract was the Montreal Intercarrier Agreement developed in 1966 by IATA and the US Air Transport Association (ATA) to forestall US denunciation of Warsaw. Acceptance of the agreement is a prerequisite for obtaining US operating permits.

The Malta Group has been a stimulus for the development of a series of airline contracts in Europe which have effectively raised the limits for most countries to the 100,000 SDR level of Montreal 3.

It is not only the level of limit that can be amended by special contract. Swissair has voluntarily agreed to pay an upfront amount of 67,750 Swiss Francs where passengers die or lose a limb in an accident. This sum is deducted from any later settlement or award.

A novel use of the special contract has recently been proposed by Professor Bin Cheng and Peter Martin - for the airlines to de facto abandon liability limitation, by simply increasing limits to $500,000 or even $1 million and accepting strict liability. (6)

The concept is intriguing, for its simplicity and the fact that action is in the hands of airlines rather than governments. But in our view, it is unlikely to find widespread support. It runs counter to the industry drive to achieve ratification of Montreal 3. It suggests levels which are too far removed from the present - except perhaps for the US and Japan. And it is presented as a step towards unlimited liability. That's a lot to swallow for most airlines and governments.

We believe, however, that a variant of this kind of special contract option offers a ready way to resolve some of the fundamental problems for passengers presented by the Montreal Protocols - namely,

- compensation limits reduced by inflation since 1975
- no procedures for up front payment or settlement inducement.
- inadequate Notice of limits.

There is nothing to stop any airline individually or collectively from voluntarily taking measures now which would go a long way towards solving these problems.

**WHAT IS NEEDED IS A COMPLEMENTARY AIRLINE VOLUNTARY OFFER TO:**

- **ADD ANOTHER TIER OF COMPENSATION TO REFLECT AN AGREED INFLATION FACTOR ON LIMITS SINCE 1975. WE SUGGEST AN AMOUNT OF SDR100,000 WHICH IS WELL BELOW ACTUAL INFLATION INCREASE.**

- **PROVIDE AN UPFRONT PAYMENT TO PREVENT HARDSHIP, AND A REASONABLE SETTLEMENT PROPOSAL WITHIN 60 DAYS OF PROOF OF DAMAGE, AND**

- **INTRODUCE A NEW FORM OF NOTICE WHICH CLEARLY ALERTS PASSENGERS TO THE LIABILITY LIMITATION**

We believe that such a commitment is the least any customer conscious airline would wish to undertake in the light of the economic facts. The reality is that inflation is far higher than the 100% increase suggested here as a compromise level. We do not believe that such an approach would make a significant difference to insurance costs - the higher limits may produce a marginal increase, but the settlement inducement would offset this by the potential for reduced legal costs.

Moreover we consider that IATA, where the industry view is coordinated, is the ideal mechanism for developing a new declaration on these lines. With over 180 airline members operating some 90% of international services, the global pattern could be readily established. The declaration could take the form of a simple position statement to which airlines could then adhere individually.

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(6) Bin Cheng and Peter Martin "The Warsaw Convention Crisis". Financial Times (London) 29 June 1989

**WE SUBMIT THAT IF THE INDUSTRY IS SINCERE IN ITS ADVOCACY OF THE BENEFITS FOR PASSENGERS OF RATIFICATION OF THE MONTREAL PROTOCOLS - AS THERE IS NO REASON TO DOUBT - A DECLARATION ON THESE LINES IS A LOGICAL COMPLEMENT. AND WE URGE IATA TO ACT WITH THE SAME SPEED AND FORESIGHT IT USED IN 1966 TO SPEARHEAD THE MONTREAL INTERCARRIER AGREEMENT.**

In putting forward this proposal, we recognize the potential for a lawyers' field day. The Guatemala and Montreal texts no longer include the provision that "Nevertheless by special contract, the carrier and passenger may agree to a higher limit of liability." (Article 22.1 of Warsaw). But none of the sources seem to give a clear explanation why.

There is a school of thought that says there can no longer be special contracts once Montreal 3 is ratified - only supplemental plans and that was part of the "deal" with the industry for the increase in limits in 1971. We do not consider this to be right in law or logic.

If an airline voluntarily wishes to contract with a passenger for a certain level of liability, that basic freedom can scarcely be constrained by the omission of a clause in the Montreal Protocol.

And if there was a "deal" it has surely been overtaken by the fact that the limits are now hopelessly outdated.

Most importantly, if the Protocols are ratified, apart from the US, most passengers will be tied to the outdated Montreal limits. The impetus for further change is not apparent. Governments will point to the relatively recent ratification as evidence of action. Some will still be considering adherence. Supplemental plans will require time to study - particularly the administrative and legal aspects.

There are few evident reasons for airlines to press for further changes. Why rock the ratification boat? In contrast to the very active pressures to ratify Montreal 3, IATA made it clear in response to the IFAPA poll that: "It is for governments to determine whether or not the introduction of a supplemental compensation plan is appropriate in the circumstances of the particular ratifying State." Professor Bin Cheng certainly seems to have reservations on this point: "What we would not like to see is the fostering of some conspiracy of silence in which one is told to cover up all the faults of the Montreal Package, to shut up and not rock the boat and jeopardise its chance of coming into force, with some vague promise that once the package has come into force, something will be done to make it even better." (7)

The fact is that once the Protocols have been ratified, further change will take considerable time, making current limits even more redundant. Which is precisely why we believe there should be an airline voluntary declaration. A declaration which should help ratification.

**To those fundamentalists who persist in arguing that such an approach cannot be considered because of legal uncertainties we say that now is the time for bold imagination and innovation not entrenched self interest. Regardless of the legal pros and cons any airline making a public offer of the kind outlined above would surely honour its commitments unless it wants to be pilloried out of commercial competitiveness by the media and public opinion.**

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(7) Bin Cheng "Liability in International Carriage by air" Paper delivered at the Leiden University/Universidad Nacional Autonoma de Mexico Latin American Conference - International Air Transport and Activities in Outer Space. Mexico 14-18 August 1988. Conference Proceedings.

The Way Forward

For almost two decades the Guatemala amendments, now incorporated in the Montreal Protocols have remained unratified. There is now a new prospect of progress sparked by the 60th Anniversary of Warsaw and signs of action on the US supplemental plan. A voluntary airline declaration could play an important catalytic role in pushing ratifications over the magic number of 30 for the Protocol to come into effect.

But numerical checkpoints are not the real issue. If the regime is to be preserved as a meaningful worldwide system capable of continuing evolution it must be embraced by the widest constituency. In other words the objective should be for as many states as possible to adhere to the Protocols, for as many airlines as possible to adopt the voluntary declaration and for states to implement supplemental plans when awards in non aviation accidents routinely surpass Montreal limits.

In response to the IFAPA Questionnaire. Sweden suggested the possibility of creating a special Warsaw Task Force to encourage ratification of the Montreal Protocols.

**WE SUPPORT THE IDEA OF A SPECIAL WARSAW TASK FORCE, CONSTITUTED BY GOVERNMENTS BUT INCLUDING AIRLINE AND PASSENGER REPRESENTATION, WITH THE TASK OF PROMOTING NOT JUST THE PROTOCOLS RATIFICATION BUT THE WIDEST POSSIBLE ADHERENCE TO THE MODERNIZED WARSAW SYSTEM.**

This proposal takes account of the success of IATA's task force on Montreal 3 but considers that the time is now ripe for governments to retake the responsibility and the initiative. It also takes account of the similar measures taken by the Netherlands Administration to establish a "Workshop on Ratification of Article 83 bis". A group whose basic objective is to bring certain aspects of the Chicago Convention up to date and thereby to "preserve the vitality of the Convention by ensuring that it continues to be reflective of international aviation realities." The workshop is drawn from states who have ratified Article 83 bis and they give assistance and guidance to any state contemplating ratification. A very clear parallel can be made with the Warsaw Convention, where we not only need ratification of the formal changes first proposed nearly 20 years ago and acceptance of those proposals by all aviation states but also measures to make the proposals valid in the 90s.

**WE PROPOSE FURTHER THAT THE 27TH ICAO ASSEMBLY REAFFIRM ITS COMMITMENT TO A CONTINUOUS MODERNIZATION OF THE WARSAW SYSTEM AND AUTHORISE THE LEGAL COMMITTEE TO URGENTLY RECOMMENCE ITS WORK ON THIS MATTER INCLUDING GIVING CONSIDERATION TO THE RECOMMENDATIONS CONTAINED IN THIS REPORT.**

**WE URGE THE 45TH IATA ANNUAL GENERAL MEETING - TO BE HELD APPROPRIATELY IN WARSAW - SERIOUSLY TO CONSIDER THE PROPOSALS IN THIS REPORT,TO SUPPORT THE INTRODUCTION OF SUPPLEMENTAL PLANS IN STATES WHERE AWARDS FOR NON TRANSPORT ACCIDENTS GENERALLY CAN BE EXPECTED TO SURPASS MONTREAL 3 LIMITS AND PARTICULARITY TO INITIATE ACTION FOR A VOLUNTARY DECLARATION ALONG THE LINES SET OUT ABOVE.**

Compensation for Unlawful Attacks on International Aviation - A Case Study

Acts of aggression against civil aviation raise unique questions in respect of compensation. Such acts, whether as a result of terrorists, as in the 1988 Pan Am 103 bombing over Lockerbie, or as a result of state intervention, as in the 1987 US downing of an Iranian Airbus or the 1983 Soviet downing of a Korean 747, are comparatively recent phenomena. They were certainly not in the minds of the framers of the Warsaw Convention in 1929 and have not been specifically addressed in any of the subsequent formal amending instruments.

How then are victims of "unlawful interference" with civil aviation compensated; More to the point, how should they be compensated?

The Leiden Institute's research revealed that the situation is far from straight forward with respect to access to compensation, level and responsibility.

The first question which may be raised is whether such acts fall within the definition of acts of God or acts of war - traditionally dealt with as special cases in compensation situations - and whether the carrier should be liable at all if it has taken adequate security measures. The problem here is that each incident becomes a case by case issue providing no consistent basis for action by airlines or travellers.

There appears to be a broad acceptance in the US and Europe that the Warsaw system "in principle" extends to unlawful interference situations. Article 17 of the 1929 Convention refers to liability for accidents which "took place on board the aircraft or in the course of the operation of embarking or disembarking". And although there is at least one instance of a European court denying liability where an airline successfully argued it had taken all necessary or possible measures to avoid the damage, most cases have been brought under the terms of the Montreal agreement with its strict liability regime. (8)

The most recent example is Pan Am's offer of $100,000 to the relations of victims of Lockerbie. This amount consists of $75,000 under the Montreal agreement plus an additional $25,000 for property damage. It is to be recalled, however, that passengers have been paying a special security fee for North Atlantic travel on US carriers for some years, there was widespread public debate on security inadequacies surrounding the case and the airline may have felt under some pressure to move quickly to bolster its image and its legal position.

Stepping back from the specific details of this offer, we believe the principle of inclusion of victims of civil interference in the Warsaw system is sound from the passenger's viewpoint. The same questions as to adequacy of compensation level, procedures and information as outlined elsewhere in this report then come into consideration.

Victims may well seek to breach the Convention limits by alleging wilful misconduct or intentional act by the carrier. This will be difficult to prove in most cases - and highly unlikely where airlines are so often the innocent victims of attacks aimed more generally at states. However in the case of KAL007 which strayed over Soviet airspace, an American Federal Jury found the crew guilty of wilful misconduct and the airline has been ordered to pay some $50 million to relatives of 137 passengers ($365,000 per passenger), having already settled 132 cases. The airline is understood to be appealing this case to the Supreme Court which has just decided in its favour in a related case - Chan v Korean Airlines - arising from the same incident. Here the decision was that the limits could not be breached simply because the notice contained on the ticket was in "8 point" type rather than the "10 point" prescribed in the Montreal Agreement.

Victims may also seek to draw in other parties than the airlines. Again arising out of the KAL007 incident, a claim was made against Boeing in respect of alleged deficiencies in the navigation equipment - but this was successfully repulsed.

Difficulties are also experienced when claims are made against airports - because ownership and operation by governments makes litigation less likely to succeed. This matter was brought into sharp focus by the appalling attacks at Athens in 1973 as well as Venice and Rome in 1975. For example, attempts by victims of the Athens attack to litigate against the Greek government have not been successful.

(8) Air France v Haddad, 19 June 1979, 1978 Air Law 180, 1980 Air Law 39. It is also reported that a similar argument was used by Egyptair in the more recent case of the hijacking and subsequent storming of their aircraft in Malta.

The situation is even more difficult where the act of unlawful interference is performed not by a terrorist group, but by state intervention. In these situations States can claim there are security or other reasons for their action - as was the case in the KAL007 flight which had penetrated Soviet airspace or the destruction of Iran Air 655 in a war zone in the Middle East. It is difficult for victims to rely on international law in these situations and pursuit of relief is lengthy and costly and not generally open to passengers on an individual basis. The possibility of "ex gratia" payments exists, based on a combination of comity and humanitarian reasons. Some states have been willing to make such payments without acknowledging breach of international duty. Such is the case with IR655 where on humanitarian grounds the US has reportedly offered to pay to relatives of the deceased, sums up to $100,000 for single persons and up to $250,000 for those supporting a family. No such offer has been made in the KAL007 case and victims' estates are left to rely on the Montreal Agreement.

**WE CONSIDER THAT IN CASES INVOLVING UNLAWFUL INTERFERENCE WITH CIVIL AVIATION, VICTIMS SHOULD BE ENTITLED TO "SPECIAL PROCEDURES" FOR OBTAINING COMPENSATION. EFFECTIVELY, THE CARRIER IS OFTEN NOTHING MORE THAN THE TARGET OF FORCES WHICH THEY CANNOT CONTROL.**

The real cause of the problem lies outside the aviation sector. This assessment does not, of course, prevent carriers from taking all necessary measures to prevent terrorist attacks. In times when these attacks have, unfortunately, become a more than rare occurrence, an even heavier burden rests on the carriers to take preventive measures. Indeed, "security" requires the combined efforts of governments (as the primary responsible parties), the airlines (via their staff, personnel, pilots and crews) and airports (privately or publicly owned). Thus, these three parties should have concurrent duties, responsibilities and liabilities towards the passenger. However, the primary role of states should be stressed; in respect of security programmes and equipment at airports, the setting up of international legal instruments and the granting of compensation (ex gratia). In view of these responsibilities and duties it seems justified that states become actively engaged in the compensation of victims of terrorist attacks.

**WE BELIEVE THAT THE COMPLEXITIES OF COMPENSATION FOR UNLAWFUL INTERFERENCE, THE DEEP INVOLVEMENT OF GOVERNMENTS - WHETHER AS THE ULTIMATE GUARANTOR OF SECURITY IN AIR TRANSPORT OR AS PERPETRATOR OF INTERVENTION - AND ABOVE ALL THE INNOCENCE OF THE VICTIMS, MERIT SPECIAL CONSIDERATION. THIS IS AGAIN AN ISSUE WHICH THE ICAO LEGAL COMMITTEE WOULD BE IDEALLY PLACED TO ADDRESS. IN THAT CONTEXT IFAPA HAS ELSEWHERE CALLED FOR THE ESTABLISHMENT OF A SPECIAL "BILLION DOLLAR" SECURITY FUND TO BE COLLECTED FROM PASSENGER CONTRIBUTIONS AND ADMINISTERED BY ICAO. WITHIN THE FRAMEWORK OF SUCH A FUND, A SUM COULD BE BUILT UP TO ASSIST THE VICTIMS OF ACTS OF UNLAWFUL INTERFERENCE TO THE EXTENT THAT CLAIMS ARE DIFFICULT TO MAKE UNDER THE WARSAW SYSTEM. STATE DONATIONS TO SUCH A FUND COULD BE ENVISAGED GIVEN THE PARTICULAR ROLE OF STATES IN THIS AREA.**

At the same time, as supplemental compensation plans are established care should be taken to ensure that they specifically include coverage of incidents involving unlawful interference. A similar position could be taken by airlines adhering to the proposed "voluntary offer" to modernize Montreal 3.

## CONCLUSIONS AND RECOMMENDATIONS ABOUT "THE NEXT MOVES"

**FROM THE PASSENGERS' PERSPECTIVE THERE WILL BE SERIOUS DEFICIENCIES IF THE PROTOCOLS SIMPLY COME INTO FORCE AS PRESENTLY CONCEIVED. THESE RELATE TO THE INADEQUACY OF THE LEVEL OF THE LIMIT, THE ABSENCE**

**OF PROCEDURES FOR UPFRONT PAYMENT OR SETTLEMENT INDUCEMENT, AND THE POOR NOTICE OF LIMITATION OF LIABILITY.**

**SUPPLEMENTAL PLANS CAN RECTIFY THE DEFICIENCIES. BUT EXCEPT FOR THE UNITED STATES IT WILL TAKE A LONG TIME TO IMPLEMENT SUCH SCHEMES.**

**A MORE IMMEDIATE IMPROVEMENT COULD ALSO BE MADE BY VOLUNTARY DECLARATION OF THE AIRLINES.**

**VICTIMS OF UNLAWFUL ATTACKS ON CIVIL AVIATION ARE IN A PARTICULARLY EXPOSED POSITION AND SPECIAL MEASURES SHOULD BE TAKEN TO IMPROVE THEIR SITUATION.**

**THE DEFICIENCIES WITH RESPECT TO LIMIT LEVEL, PROCEDURES AND NOTICE SHOULD BE TAKEN CARE OF IN THE CONTEXT OF RATIFICATION OF THE MONTREAL PROTOCOLS.**

**STATES SHOULD ACCELERATE THE INTRODUCTION OF SUPPLEMENTAL PLANS WHERE WARRANTED. THE EUROPEAN COMMUNITY SHOULD SPEARHEAD A PAN EUROPEAN PLAN.**

**AIRLINES SHOULD VOLUNTARILY OFFER TO INTRODUCE A NEW TIER OF COMPENSATION OF SDR 100,000 ABOVE MONTREAL 3 LIMITS TO REFLECT SUBSEQUENT INFLATION, TO IMPROVE SETTLEMENT PROCEDURES AND PROVIDE GOOD CLEAR NOTICE. IATA SHOULD PROVIDE A MECHANISM FOR THIS APPROACH.**

**A GOVERNMENT LED, WARSAW TASK FORCE SHOULD BE CREATED TO PROMOTE ADHERENCE TO A MODERNI2ED WARSAW SYSTEM.**

**THE 27th ICAO ASSEMBLY SHOULD REACTIVATE THE WORK OF THE LEGAL COMMITTEE IN THIS AREA.**

**THE 45TH IATA ANNUAL GENERAL MEETING SHOULD TAKE STEPS TO PROMOTE THE AIRLINE VOLUNTARY OFFER AND THE INTRODUCTION OF SUPPLEMENTAL PLANS WHERE WARRANTED.**

**A SPECIAL FUND SHOULD BE ESTABLISHED TO ENSURE THAT VICTIMS OF UNLAWFUL ATTACKS ON CIVIL AVIATION ARE ADEQUATELY COMPENSATED.**

## WARSAW THROUGH THE 90s

If the proposals set out in the previous section are implemented - ratification of Montreal 3 with a voluntary modernization offer and introduction of supplemental compensation plans - the continuation of the Warsaw system should be assured.

This should provide the opportunity to consider how the system might be further improved in the years ahead.

### Consolidation and Enhancement of the Warsaw Instruments

To continue the evolutionary patterns, the first distinct step that might be envisaged is a simple consolidation of the various texts - Warsaw, Hague, Guatemala and Montreal - into a single instrument. The objective from the passenger viewpoint would be to ensure that as many states as possible move to adherence of such consolidated text including the Montreal Protocols.

While this work is in process, we believe urgent consideration must be given to the question of Notice to passengers. This would mean, ensuring that a new Notice was developed, along the lines set out in this report and that a provision be developed to assure that inclusion of that notice be mandatory if the liability limitation is to be obtained. This condition should apply regardless of whether the ticket is in printed or electronic form. In taking this position, we well recognize that, in due course, paperless passenger processing can be expected - from magnetic stripe on code documents to smart cards with the information recorded on a chip in a credit card. No matter what medium is used for these, we consider it imperative that if the airline is to be given the benefit of a liability limitation then it has a duty to provide adequate notice, so that the passenger in turn can decide whether he wants to take other insurance measures. This duty should be clearly codified in the Warsaw instruments.

Other procedural deficiencies identified in this report, namely the provision of upfront payment and settlement inducement conditions could be taken up in the same way.

Such an approach, by deliberately excluding the more controversial issue of changes to the level of the limits would have a reasonable chance of finding consensus.

Opposition to change of any kind beyond Montreal 3 can of course be envisaged. But we believe that many states would be sympathetic to such matters as improving Notice or hardship relief - even when they would not support any review of limit levels. The moreso if the procedural defects had already been addressed by airlines themselves through the "voluntary offer." At the same time, States who want to revise limits will still have the option to develop supplemental plans.

**EVEN A MODEST OBJECTIVE LIKE CONSOLIDATION OF THE TEXT MIGHT BE A LONG PROCESS PARTICULARLY IF IT ALSO TRIES TO REMEDY PROCEDURAL SHORTCOMINGS. NEVERTHELESS WE BELIEVE THAT THE INSTRUMENTS MUST BE UPDATED IF THEY ARE TO RETAIN CONTINUING VALIDITY AND CONSIDER THAT THE ICAO LEGAL COMMITTEE SHOULD BEGIN TO EXPLORE THE POSSIBILITIES NOW.**

Updating Compensation Limits

It will be an even longer exercise to re-address the question of limits. Not even the most enthusiastic advocate of change could contemplate any near term review while Montreal 3 is in the process of ratification and Supplemental schemes are only in embryonic form. However, we believe that in the long term this issue must be addressed. Moreover, it would seem that any attempt to recodify Montreal 3, and set limits at a higher level would in effect draw into question the viability of the system as a whole. We shall deal with this issue therefore in the long term context of a new convention.

**Warsaw 2000 - Prospects for a New Convention**

We do not realistically see the prospect of a new Convention during the 90s, but see merit in establishing a study group to explore the kind of regime that would be needed by the end of the decade.

We shall not pay too great attention here to the concept of unlimited liability. While attractive from a passenger viewpoint, it would encounter fierce opposition from the majority of airlines and governments. However, in a decade, given the accelerating pace of change for the industry and shifting socio-economic standards, such a proposal may well find greater acceptability. Any study of Warsaw 2000 should therefore keep this concept under review.

A more realistic approach to a new Convention would be to aim at retaining limits at higher levels incorporating basic features proposed elsewhere in this report. Such features would include:-

- improved mechanisms to routinely increase limits to reflect inflation and socio-economic evolution, expressed in SDR.
- an option for supplemental schemes or special contracts to increase or eliminate limits
- strict liability
- clear notice, upfront payment and settlement inducement provisions.
- jurisdiction extended to state of passenger domicile or residence.

In addition a serious attempt should be made to resolve the anomaly of the unprotected parties in the liability chain. One possibility would be for inclusion as protected parties within a new convention but with substantially higher limits.

In contemplating Warsaw 2000 along these lines, there are two critical areas to explore concerning limits. Firstly, the projection of appropriate levels of limitation for the end of the decade and development of a mechanism to provide for periodic adjustment according to an agreed standard (such as the Consumer Price Index in OECD states). Secondly, establishment of a procedure for tracking damage awards in both transport and non transport fields to provide an objective basis for reassessment of levels and guidance for the triggering of supplemental schemes. These will require co-operation and involvement of the insurance industry who have both the knowledge and the data to assist in the development of statistical models and criteria for limit review and trigger mechanisms.

In addition there is an important area of study concerning procedures - namely how to ensure that adequate Notice is given even where virtually all paper tickets are going to be replaced by machine readable documents.

An approach to Warsaw 2000, along the lines indicated above, could have significant benefits for passengers. (9)

- It would preserve uniformity which is the key feature of the Warsaw system in an era when airlines will be taking more individual approaches to their commercial activities.
- It would give a basis for easy transition to homogenous supplemental schemes.
- It would provide essential consumer protection by requiring proper Notice of limitation of rights.
- Above all, it would ensure that limits on compensation are just and give an adequate envelope for rapid settlement of claims without routine recourse to litigation.

It would also have benefits for airlines.

- Maintaining a worldwide regime would be useful for the operation of an industry which is becoming increasingly global in nature, with cross shareholdings of airlines and more private than government ownership.

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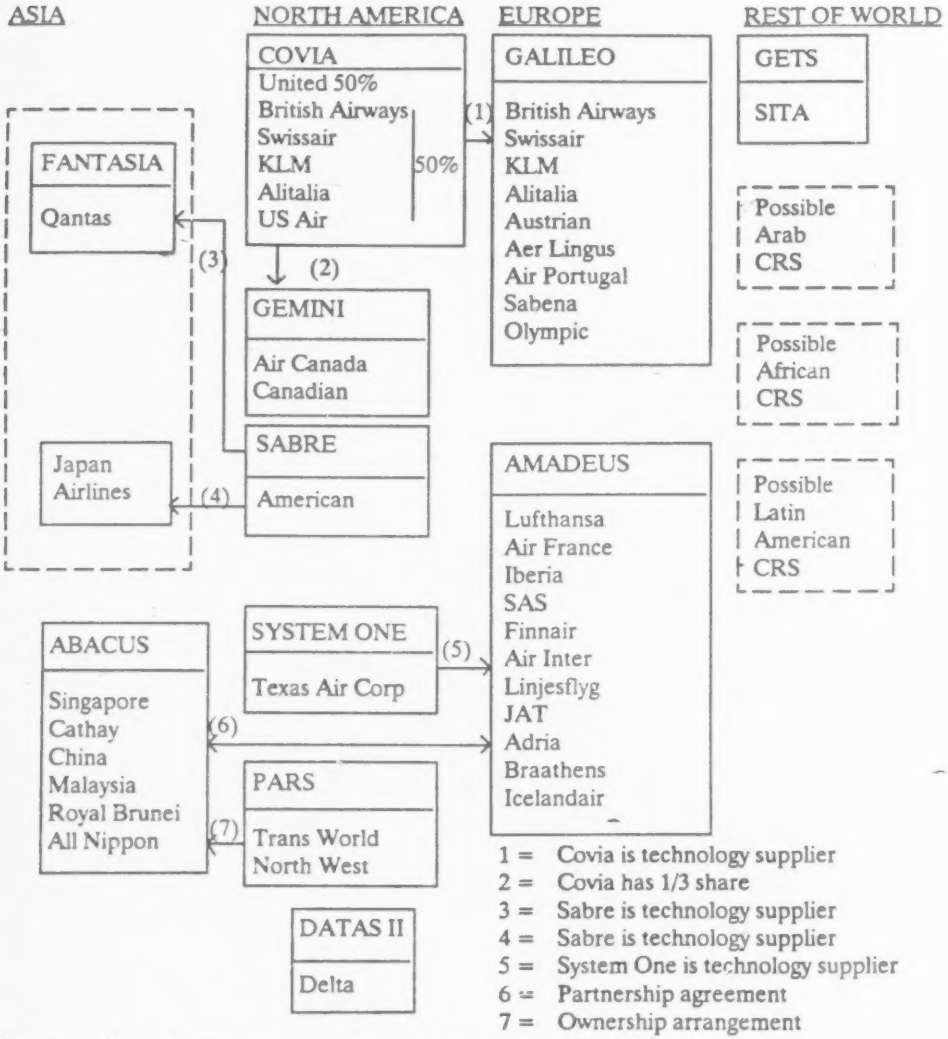
(9) In this context we have noted and taken into account the interesting prototype conventions which have been developed by a group of lawyers and academics - the Alvor Conventions, Alvor I which proposes an unlimited liability regime and the less radical Alvor II which retains limits but relatively easy mechanism for adjustment of limits. These would make a useful contribution to the study envisaged.

- Dealing fairly with the consumer protection issues would be consistent with the emerging emphasis on customer consciousness and putting passengers first.
- Potential and actual litigation costs should be reduced without insurance premiums rising significantly. Moreover as supplemental schemes emerge, the burden of insurance costs would be passed to the passenger in return for the improved cover.
- An equitable way might be found to include other co-liable parties, eliminating a longstanding source of friction.

We believe that a "balance" of benefits of this kind would be consistent with the spirit of the trade-off that was sought back in 1929 when Warsaw was formulated and would redress the imbalance which currently exists to the passengers detriment.

**SUPER CRS INTERRELATIONSHIPS**




Source: IFAPA - Compiled from Press Reports, September 1989

The ultimate objective - a new convention built on Warsaw's lasting foundations - would be a bold and certainly controversial step but it is already long overdue. The inevitable resistance, even to discussions from certain industry and government sources should be allayed by an analytical gradualistic approach of the kind contemplated here.

**WE RECOMMEND THAT IN RE-ESTABLISHING THE WORK PROGRAMME OF THE LEGAL COMMITTEE IN THIS FIELD, THE 27th ICAO ASSEMBLY ALSO INITIATE A FEASIBILITY ANALYSIS OF WARSAW 2000.**

The Role of Super CRS

In requesting this study the Minister asked that special consideration be given to the role that SuperCRS might play in this field in the future.

We do not intend to analyse in depth, developments in automated distribution, which are extensively documented elsewhere. For our purposes we simply note that:-

* airlines are pouring hundreds of millions of dollars into SuperCRS.

* they see this as the way to distribute a range of travel related products most efficiently in the more competitive future, to protect and penetrate markets and to make money.

* there are ten or more supersystems in existence or formation, and they are establishing interlocking relationships between themselves. (See Figure 7).

* SuperCRS are assembling massive data bases of information on airline product features - fares, schedules, seat availability etc - as well as ancillary travel information such as hotels, rental cars, theatre tickets, etc. They will also store information on passenger profiles.

* Apart from the US systems, the other SuperCRS are only becoming fully operational in 1990 and in the initial stages are concentrating on development of basic airline products, data bases, establishing market position and signing contracts with travel agents.

* SuperCRS will be an essential link in the future automated passenger processing chain whereby traditional tickets will eventually be replaced by machine readable tickets using magnetic stripe or optical scanning technology and in the long term by "smart" cards using an interactive microchip to store essential reservation, boarding and accounting data.

* Most travel agents will be linked to Super CRS in the early 90's - initially to one system but eventually with access to all. More and more airline tickets will be sold by travel agents (more than 80% of all tickets are already sold by agents in the US and the numbers are increasing rapidly elsewhere as competitive choices emerge). In the 90s, we expect to see increasing direct sales to large corporations and individuals via direct computer access to SuperCRS and through the use of airline issued Smart Cards.

It is against this background that we believe SuperCRS can play a growing role in respect of passenger compensation. Firstly, as regards Notice to passengers. Secondly in making available supplementary insurance cover - whether as part of a mandatory supplemental scheme or by making private insurance easily available at point of ticket purchase.

As regards Notice - at the most basic level of consumer information the revised Notice proposed in this report, can still be printed on ticket stock as it is today. Equally, the text could be routinely generated as part of a ticket message, although it is doubtful whether there would be any practical advantages of this. Additionally, however, it can be programmed into the CRS screen as part of the messages that sales staff or agents are prompted to give to passengers.

At a further level of information, there is little technical problem foreseen with having a

database of liability limits of all airlines which could be identified in respect of the flight sectors concerned. Such information could be called up to screen in response to passenger enquiries and printed out if needed.

In the case of electronic information, there is already a procedure in use in the US which gives an indication of possible future trends. The passenger using a self ticketing machine is asked a sequence of questions on a screen. After each one he presses a specific button and on completion of the cycle a ticket is issued. During the course of the questions he is alerted to the fact that liability is limited and directed to read a notice on a ticket jacket stocked by the machine. Only when he signifies by pressing a button, that he has read and understood the notice can he proceed to the next steps leading to ticket issuance. variants of this approach can be readily envisaged for other forms of direct ticketing - via home computer and modem for example - and eventually for Smart Card purchase.

The real issue here however is not technology but motivation. The airline sales process is intensive and complex. There is undoubtedly little incentive for airlines or agents to complicate it further by consumer information which slows productivity and profitability.

In response to the IFAPA poll, both Amadeus and Galileo confirmed the technical capability of systems to insert a revised notice into CRS displays and into passenger itineraries. Other respondents generally felt this would be a positive step. One CRS system commented however, "though notice could be printed as part of the itinerary, it would not be effective for most passengers and confusing for all."

In the final analysis, we do not believe it is necessary to print out the details of limits per carrier. Consumer protection also has its limits. Providing the passenger is guaranteed notice that there are limits, the onus is on him to enquire as to the details if he is concerned about it. But that information must be readily available on request. Where the CRS can play a role is to provide that information rapidly and precisely to agents and airline staff related to the specific routing of the concerned passenger. This would be a great advance on the current situation where the passenger is advised he can check through the conditions of contract at an airline office . and if he is lucky enough to locate them, he requires a law degree to interpret them.

This leads to the broader question as to whether and how SuperCRS might be used to improve compensation prospects. As we have observed earlier, nothing in the Warsaw regime prevents passengers from buying private insurance. It is simply the fact that insurance has not been promoted by the airlines, because of the connotations with questions about safety and because it is an administratively complex and time consuming business.

However, it is not difficult to envisage that sale of insurance products could be offered by the SuperCRS on a similar basis to sale of theatre tickets or rental cars. Indeed this possibility exists in embryonic form in the United States.

Both Amadeus and Galileo confirmed in response to the IFAPA poll that they foresaw their systems as possible vehicles for selling additional compensation insurance. One vendor considered it would take from 1 to 2 years to introduce such a product line, the other estimated from 3 to 5 years.

Nearly 70% of respondents to the IFAPA poll never purchase supplementary insurance cover. Of the 30% who do purchase, the vast majority do so because they are aware that limitations exist and they are seeking extra compensation possibilities.

In its response, IATA indicated that "carriers are not in the business of accident insurance ... but nothing prevents or even has prevented passengers from deciding whether in view of their own personal circumstances additional protection is necessary. What passengers should receive is adequate notice of any limits on the carriers' liability."

Here we have no disagreement. We believe that if the passenger receives proper notice and is offered the option of easily taking additional compensation cover at the time of making his ticket purchase decision - a far greater number of passengers would elect to buy than presently do. This would seem to be indicated by the results of the poll shown in Appendix C. We expect the SuperCRS to be in a position to act as a catalyst for this to happen in the early 90s once they have put their basic airline product line in place.

To the extent that this can help to provide better levels of compensation to those choosing to purchase, it should certainly be a goal of those seeking an improvement to the Warsaw system.

**CONCLUSIONS AND RECOMMENDATIONS ABOUT WARSAW THROUGH THE 90s**

**THERE WOULD BE MERIT IN CONSOLIDATION OF THE WARSAW SYSTEM TEXTS INTO A SINGLE INSTRUMENT.**

**AN INITIATIVE IS URGENTLY REQUIRED TO RECTIFY PROCEDURAL SHORTCOMINGS - PARTICULARLY PROVISION OF ADEQUATE NOTICE.**

**AN ATTEMPT TO FORMALLY CHANGE LIMIT LEVELS IN THE 90s OTHER THAN BY SUPPLEMENTAL PLANS COULD ONLY BE DONE BY A NEW CONVENTION. IMMEDIATE CONSUMER NEEDS COULD BE MET THROUGH SUPPLEMENTAL COMPENSATION SCHEMES.**

**SUPERCRS CAN PROVIDE A VEHICLE FOR IMPROVING NOTICE AND OFFERING ADDITIONAL COMPENSATION COVER.**

**RECOMMENDATIONS**

**THE ICAO LEGAL COMMITTEE SHOULD CONSIDER A CONSOLIDATION OF THE WARSAW SYSTEM TEXTS AND WAYS TO RECTIFY PROCEDURAL DEFICIENCIES.**

**ICAO SHOULD INITIATE A STUDY OF WARSAW 2000 TO PREPARE FOR THE LONG TERM IMPROVEMENT OF THE WARSAW SYSTEM.**

**AIRLINES, COMPUTER RESERVATIONS SYSTEMS AND THE INSURANCE INDUSTRY SHOULD CONSIDER WAYS TO PROVIDE GOOD CONSUMER INFORMATION ON THE WARSAW SYSTEM AND ADDITIONAL COMPENSATION COVER THROUGH SUPER CRS.**

APPENDIX A

## STATES PARTY TO THE WARSAW SYSTEM

| COUNTRY | WARSAW | HAGUE | GUATEMALA | MONTREAL |
|---|---|---|---|---|
| Afghanistan | + | + | | |
| Algeria | + | + | | |
| Argentina | + | + | | |
| Australia | + | + | | |
| Austria | + | + | | |
| Bahamas | + | + | | |
| Bangladesh | + | + | | |
| Barbados | + | | | |
| Belgium | + | + | | |
| Benin | + | + | | |
| Botswana | + | | | |
| Brazil | + | + | | + |
| Brunei | + | | | |
| Bulgaria | + | + | | |
| Burkina Faso | + | | | |
| Burma | + | | | |
| Byeloruswsian | + | + | | |
| Cameroon | + | + | | |
| Canada | + | + | + | |
| Chile | + | + | | |
| China | + | + | | |
| Colombia | + | + | + | + |
| Congo | + | + | | |
| Costa Rica | + | + | | |
| Cote d'Ivoire | + | + | | |
| Cuba | + | + | | |
| Cyprus | + | + | | |
| Czechoslovakia | + | + | | |
| Korea (DPR) | + | + | | |
| Denmark | + | + | | + |
| Dominican Republic | + | + | + | |
| Ecuador | + | + | | |
| Egypt | + | + | | |
| El Salvador | | + | | |
| Equatorial Guinea | + | | | |
| Ethiopia | + | | | + |
| Fiji | + | + | | |
| Finland | + | + | | + |
| France | + | + | | |
| Gabon | + | + | | |
| Germany (GDR) | + | + | | |
| Germany (FDR) | + | + | | |
| Greece | + | + | + | + |
| Grenada | | + | | |
| Guatemala | | + | | |
| Guinea | + | + | | |
| Hungary | + | + | | + |
| Iceland | + | + | | |
| India | + | + | | |
| Indonesia | + | | | |

| COUNTRY | WARSAW | HAGUE | GUATEMALA | MONTREAL |
|---|---|---|---|---|
| Iran | + | + | | |
| Iraq | + | + | | |
| Ireland | + | + | | + |
| Israel | + | + | | + |
| Italy | + | + | + | + |
| Japan | + | + | | |
| Jordan | + | + | | |
| Kenya | + | | | |
| Kuwait | + | + | | |
| Laos | + | + | | |
| Lebanon | + | + | | |
| Lesotho | + | + | | |
| Liberia | + | | | |
| Libya | + | + | | |
| Liechtenstein | + | + | | |
| Luxembourg | + | + | | |
| Madagascar | + | + | | |
| Malawi | | + | | |
| Malaysia | + | + | | |
| Mali | + | + | | |
| Malta | + | | | |
| Mauritania | + | | + | |
| Mexico | + | + | | |
| Monaco | | + | | |
| Mongolia | + | + | | |
| Morocco | + | + | | |
| Nauru | + | + | | |
| Nepal | + | + | | |
| Netherlands | + | + | + | + |
| New Zealand | + | + | | |
| Niger | + | + | + | |
| Nigeria | + | + | | |
| Norway | + | + | | + |
| Oman | + | + | | |
| Pakistan | + | + | | |
| Papua New Guinea | + | + | | |
| Paraguay | + | + | | |
| Peru | + | + | | |
| Philippines | + | + | | |
| Poland | + | + | | |
| Portugal | + | + | | + |
| Qatar | + | + | | |
| Korea (R) | + | + | | |
| Romania | + | + | | |
| Rwanda | + | | | |
| Samoa | + | + | | |
| Saudi Arabia | + | + | | |
| Senegal | + | + | | |
| Seychelles | + | + | + | |
| Sierra Leone | + | + | | |
| Singapore | | + | | |
| Solomon Islands | + | + | | |
| South Africa | + | + | | |
| Spain | + | + | | + |
| Sri Lanka | | + | | |

| COUNTRY | WARSAW | HAGUE | GUATEMALA | MONTREAL |
|---|---|---|---|---|
| Sudan | + | + | | |
| Swaziland | + | + | | |
| Sweden | + | + | | + |
| Switzerland | + | + | | + |
| Syria | + | + | | |
| Togo | + | + | + | + |
| Tonga | + | + | | |
| Trinidad & Tobago | + | + | | |
| Tunisia | + | + | | |
| Turkey | + | + | | |
| Uganda | + | | | |
| Ukrain | + | + | | |
| USSR | + | + | | |
| United Arab Emirates | + | + | | |
| United Kingdom | + | + | | + |
| USA | + | | | |
| Uruguay | + | | | |
| Vanuatu | + | + | | |
| Venezuela | + | + | | |
| Viet Nam | + | + | | |
| Yemen | + | + | | |
| Yugoslavia | + | + | | |
| Zaire | + | | | |
| Zambia | + | + | | |
| Zimbabwe | + | + | | |

APPENDIX B

## COMMENTS FROM QUESTIONNAIRE CONCERNING EFFECTIVE NOTICE OF LIMITS

### Consumer Organisations

Obligatory information (should be provided) whenever possible on all schedules, promotional materials etc. Anywhere - where possible. - **The Danish Consumer Council**

Information should be provided on leaflets before a booking is made and available at travel agencies and airports. - **Test Achats, Belgium**

Notice should be given on a separate slip, highlighting the possibilities of obtaining additional personal protection through an insurance company. - **Danish Shippers Council**

Notice should be provided at the check-in counter. - **Dutch Consumers Association**

Display boards at airports. - **Consumers' Union, Malta**

### Other Groups

Compulsory oral explanation of the liability limits by the ticket vendor to the consumer.

There is not an effective way to inform passengers of limits.

Provide Notice when purchasing any airline ticket.

Post visible, legible signs wherever airline tickets are sold - i.e. travel and airline agencies.

Warnings in travel agents - holiday TV and Radio programmes, newpaper "Travel" coverage.

Travel catalogues.

Views of selected academics and lawyers.

**APPENDIX C**

## OBSERVATIONS AND RESULTS FROM IFAPA POLL

### Methodology

In preparing for this study various research techniques were employed; reference to primary and secondary material, interviews and the distribution of a questionnaire.

Between April and May 1989 four versions of a questionnaire were developed with the objective of ascertaining current industry and passenger opinion on different aspects of the compensation system.

Passengers were polled in Switzerland, United Kingdom, Hong Kong, India, United States, Portugal and Jordan.

Responses to the questionnaire were also received from the European governments of Switzerland, Ireland, United Kingdom, France, Sweden, Iceland, Denmark, Germany (FDR), Austria and Luxembourg.

A detailed response was also received from Australia.

A response was received from IATA on behalf of their member airlines.

In addition responses were received from lawyers, academics and from several representatives of specialised aviation insurance brokers.

Responses were received from the following consumer organisations:

| | |
|---|---|
| Australia: | National Consumer Affairs Advisory Council |
| | Canberra Consumers Inc. |
| Belgium | Test Achats |
| Denmark | Forbrugerradet |
| Malta | Consumer's Union |
| Netherlands | Consumentenbond |
| Portugal | Instituto Nacional De Defensa Do Consumidor |
| Sweden | The National Swedish Board for Consumer Policies/ |
| | The Consumer Ombudsman |
| Spain | Organization de Consumidores Y Usarios |
| Switzerland | J'archete mieux |

The principal results were as follows:

**A) Warsaw Today/Tomorrow and 2000. Adoption of Montreal 3, Supplemental Plans and Development of a New Convention**

Lawyers, academics and the insurance industry

A majority favour adoption of Montreal 3 in the short term. Of this majority, in excess of 70% favour adoption accompanied by the development of supplementals.

Over 50% of respondents favour the development of a new convention over the long term with or without limits.

European Governments

Majority favour adoption of Montreal 3 in the short term and over the longer term the development of Supplemental Plans.

Only one government supports the concept of developing a new convention over the longer term - with limits retained.

**B) Fair Compensation**

**i) Adequacy of limits**

European Governments

Of those governments that responded to this question, 80% considered the current levels adequate.

**ii) The existence of limits**

Consumer Organisations

73% considered that an airline's liability should be limited.

**C) Single & Speedy Procedures**

**i) Speed of settlement**

Laywers, academics and the insurance industry

Equally divided as to the question of whether liability limits retard or facilitate the speed of settlement. However, those working directly in the litigation process tended towards the attitudes that the limits retard the speed of settlement.

European Governments

Majority considered that the limits facilitate settlement. However, one government who considered that the current limits (i.e. Warsaw/Hague) hindered, added that they expected speedier settlement following the entry into force of Montreal 3.

**ii) Upfront Payments**

Consumer Organisations

92% supported the concept of guaranteed "upfront payments" - i.e. a lump sum payment delivered immediately after the accident to victims or their dependents. The sum would not affect the final amount of damages awarded.

Lawyers, academics and the insurance industry

70% of this group agreed the concept.

European Governments

Of the governments that responded only 33% supported the idea.

**D) Supplemental Plans**

Consumer Organisations

90% were in favour of the idea that the EEC should spearhead a Pan-European approach to developing Supplemental Plans.

Lawyers, academics and the insurance industry

70% supported the concept.

European Governments

Of those that responded to the question, governments were equally divided. One government added that different supplemental plans within western Europe should be avoided at any price and suggested that a common scheme could be developed within an ECAC framework or by an informal group of experts.

**F) Clear Notice**

Passengers

55% responded that after reading the Notice (the Notice was provided) they did not understand its meaning. 92% said the limits should be explained in "simpler terms using language that is more comprehensible to the average passenger".

43% of passengers had ever read the Notice prior to being questionned for the Poll.

Consumer Organisations

92% responded that they did not believe that the majority of passengers had read the Notice - 100% that passengers did not understand the meaning of the Notice.

100% agreed that a new Notice be drafted, while 91% considered that passengers could be effectively informed of the limits by inserting a Notice in tickets and into CRS displays with a print out accompanying the itinerary.

Lawyers, academics and the insurance industry

90% agreed that a new Notice should be drafted.

This group favoured a combination of Notice inserted in the ticket and insertion in CRS programmes as a means of improving information to passengers.

European Governments

67% of thos governments that responded to the question agreed that a new Notice should be drafted. The same number supported a combination of Notice in tickets and insertion in CRS as a means of providing more effective notice.

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